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In The

Supreme Court of the United States

October Term, 1992

TIMOTHY JANSEN, DANIEL K. GOENS, ROBERT H. PRASSE, EVAN WOOD, and MARC E. MONAHAN;

and

WILLIAM NEAL, BRIAN CLEMENS, FRANK GORRASI, GREGORY HISSETT, and PHILIP S. RAMSTETTER;

and

DANIEL R. CORRY, NOAH H. GIBBS IV, TIMOTHY B. BURWICK, LAWRENCE D. CAPPEL, ROBERT HART, JEFFREY H. SWEET, MARK E. KREIMER, NICHOLAS SCHIBI, and TIMOTHY A. CUNNINGHAM,

Petitioners,

vs.

CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION, WILLIAM MILLER, and NORMAN WELLS;

and

TILFORD YOUNGBLOOD, RALPH NICHOLS,

and

THE PLAINTIFF CLASS CONSISTING OF BLACK APPLICANTS FOR AND BLACK EMPLOYEES OF THE DIVISION OF FIRE OF THE CITY OF CINCINNATI,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Absent some showing of the present effect of past discrimination, may a city constitutionally employ racial quotas to set aside a predetermined number of positions in a fire division recruit class for African-American applicants, notwithstanding the fact that by virtue of this quota, non-minority applicants are denied positions in the recruit class solely because of their race?

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners request that a Writ of Certiorari be issued to review the decision and Judgment of the United States

Court of Appeals for the Sixth Circuit entered on October 13, 1992. This decision vacated a decision and Order of the United States District Court for the Southern District of Ohio, Western Division, terminating certain hiring practices of the City of Cincinnati Fire Division which had been undertaken pursuant to a Consent Decree entered in 1974. On December 29, 1992, the Sixth Circuit denied Petitioners' Suggestion for a Rehearing and Rehearing *En Banc*.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio, Western District, is contained in the Appendix at App. 1, and is unreported. It is cited as *Jansen v. City of Cincinnati*, No. C-1-89-079, C-1-89-479 and C-1-90-151 (S.D. Ohio, March 18, 1991).

The opinion of the United States Court of Appeals is contained in the Appendix at App. 13 and is reported as *Jansen v. City of Cincinnati*, 977 F.2d 238 (6th Cir. 1992). Petitioners were notified by letter from the Clerk of the United States Court of Appeals for the Sixth Circuit that Petitioners' Suggestion for a Rehearing and Rehearing *En Banc* was denied.

JURISDICTION

The final judgment of the Court of Appeals is reflected in its denial of Petitioners' Suggestion for a Rehearing and Rehearing *En Banc*, which was entered on

December 29, 1992. Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit in this cause, by a writ of certiorari, is conferred on this Court by 18 U.S.C. § 1254(1) (1992).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(See Appendix for verbatim recitation)

1. Fourteenth Amendment to the United States Constitution.

2. 42 U.S.C. § 1983 (1992) – Civil Action for Deprivation of Rights.

3. Ohio Rev. Code Ann. § 124.26 (Baldwin 1992) – Eligible lists; veteran's preference; existing employees who pass examination.

4. Ohio Rev. Code Ann. § 124.27 (Baldwin 1992) – Appointments; certified and provisional; probationary period.

5. Ohio Rev. Code Ann. § 124.90 (Baldwin 1992) – Waiver of laws to avoid federally prohibited discrimination.

STATEMENT OF THE CASE

Petitioners Timothy Jansen, Daniel K. Goens, Robert H. Prasse, Evan Wood and Marc E. Monahan (hereinafter the "Jansen Petitioners") filed their original Complaint in the United States District Court for the Southern District

of Ohio, Western Division, on February 2, 1989. Petitioners William Neal, Brian Clemens, Frank Gorrasi, Gregory Hissett, and Philip S. Ramstetter (hereinafter the "Neal Petitioners") filed their original Complaint in the United States District Court for the Southern District of Ohio, Western Division, on July 5, 1989. Petitioners Daniel R. Corry, Noah H. Gibbs IV, Timothy B. Burwick, Lawrence D. Cappel, Robert Hart, Jeffrey H. Sweet, Mark E. Kreimer, Nicholas Schibi, and Timothy A. Cunningham (hereinafter the "Corry Petitioners") filed their original Complaint in the United States District Court for the Southern District of Ohio, Western Division, on February 23, 1990.[1]

Respondent City of Cincinnati (hereinafter the "City") has, since 1974, segregated test scores from Civil Service examinations given to candidates for hiring, by its Fire Division, into two separate lists: a list of the white applicants and a list of the African-American applicants. The City then hires a predetermined number of applicants from each list into each recruit class. Under this race-conscious, dual-list hiring system various African-American candidates have been hired, even though they received lower tests scores than various white candidates, including Petitioners. (App. 13).

As authority for resorting to this race-conscious, dual-list hiring system, Respondents rely upon a Consent Decree which was entered in 1974 between the City of Cincinnati, the Legal Aid Society, and minority plaintiffs

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[1] Certain of these individuals have withdrawn from this litigation prior to the filing of this petition.

in the case of *Youngblood v. Dalzell*, Civil No. 90-8774 (S.D. Ohio 1974) (App. 31). The *Youngblood* Consent Decree mandated that the City undertake certain affirmative action measures in areas such as advertising, recruiting, screening, and hiring in order to increase levels of black employment in the Fire Division (App. 34-35).

The Consent Decree was entered into in the absence of any showing that the City had discriminated against African-Americans, either in its hiring or promotion practices. No testimony, no direct evidence and no statistical evidence showing that the City selected a disproportionate number of non-minority candidates from a qualified labor pool was ever provided by the City. The Consent Decree does not recite that any individuals have been deprived of any rights. Nor does it state that the City's pre-1974 method of hiring, which was mandated by state law, was in any way discriminatory. In fact, in the Decree the City specifically denied at any time having discriminated against African-American fire recruit candidates. (App. 32.)

The Consent Decree contains timetables and goals for achievement of certain levels of minority employment, both in the Fire Division as a whole, and in each recruit class after 1974.[2] However, the Consent Decree does not

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[2] The Consent Decree set forth interim goals for increasing the overall Fire Division composition of minorities gradually from 4.2 percent (4.2%) by December 31, 1974, to eighteen percent (18%) by December 31, 1980 (App. 41). The City has long since met these goals.

The Decree also provides that the City will be "deemed to have sought to achieve such stage of the work composition *goals*

provide for the race-segregated, dual-list scheme employed by the City over the last eighteen years in order to meet those goals. The City's use of such racial quotas runs contrary to Ohio law which, by virtue of the City of Cincinnati's Charter, is binding on the City of Cincinnati. According to the Ohio Revised Code Annotated § 124.26 (Baldwin 1992) (App. 67), candidates for the Fire Division must be placed on an eligible list "in order of their relative excellence as determined by examination." Furthermore, Ohio Rev. Code Ann. § 124.27 (Baldwin 1992) (App. 68) requires that each vacant position be filled from the eligible list by hiring one of the three candidates highest on the list for each available position.[3]

The *Jansen*, *Neal* and *Corry* Petitioners, all of whom are white, were denied positions in the 1988, 1989 and 1990 recruit classes respectively, by virtue of the race-based quota. Petitioners were unlawfully deprived of their property rights as guaranteed by the Fourteenth Amendment of the United States Constitution (App. 64), as well as Title 42 U.S.C. § 1983 (App. 66), because the

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in good faith if at least forty percent (40%) of the fire recruit class for any given year consisted of minority persons." (App. 41-42) (Emphasis added).

[3] Ohio law mandates a requirement for screening new recruits called "The Rule of Three." This Rule requires that new recruits be hired from one of the three (3) recruit candidates highest on the list. An individual is dropped from the list after having been passed over three (3) times. Since one of the three (3) must be hired, the new recruits are still hired in the general order of excellence. The Rule of Three is *not* an issue in this petition.

City's dual-list scheme worked to exclude them from their respective recruit classes solely on the basis of their race. The *Jansen*, *Neal*, and *Corry* cases were consolidated for trial.

After completion of discovery, the United States District Court considered the matter on Cross Motions for Summary Judgment. The District Court, without reaching the constitutional issues raised by Petitioners, granted Petitioners' Motion for Summary Judgment. The Court ruled that since the City had long since met its goal of eighteen percent (18%) minority composition within the Fire Division, that portion of the *Youngblood* Consent Decree which pertains to the hiring of recruits was no longer operative (App. 12).

Thereafter, Respondents filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit.[4] The parties briefed and argued the issues before the Court. On October 13, 1992, the Court of Appeals issued its opinion in which it vacated the decision of the lower court. (App. 13). The Sixth Circuit addressed Petitioners' constitutional claims and ruled that the use of the race-conscious dual-lists in implementing the Consent Decree's hiring goals did not abridge Petitioners' constitutional rights.[5] (App. 13).

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[4] Petitioners also filed a Notice of Appeal from District Court's failure to grant an appropriate remedy, making Petitioners whole for losses suffered by virtue of their wrongful denial of positions in the 1988, 1989 and 1990 recruit classes.

[5] The 1991 amendments to the Civil Rights Act were not part of this litigation. Even if they had been, the new Amendments would not have altered the outcome in Petitioner's favor.

It is from the Sixth Circuit's decision that this petition for Writ of Certiorari is taken. The Sixth Circuit decision is at odds with this Court's prior rulings that a political subdivision's use of racial classifications deprives one of his or her constitutionally protected property rights under color of state law.[6]

ARGUMENT

I. REASONS FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

Given the historical backdrop of pervasive discrimination by public entities against African-Americans and other minorities, the Supreme Court has traditionally viewed racial classifications adopted by cities, counties, and other political subdivisions as odious and inherently suspect. *See Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

In recent years, as many of these same public entities have implemented various forms of affirmative action to maintain or increase the number of African-Americans in various vocational or commercial endeavors, this Court

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This claim was brought under the Fourteenth Amendment to the Constitution, not under Title VII of the Civil Rights Act. Public employers are held to a higher constitutional standard. *Washington v. Davis*, 426 U.S. 229, 238-39, 246-47 (1976).

[6] The Sixth Circuit also vacated that portion of the District Court's Order terminating the hiring aspects of the *Youngblood* Consent Decree. Petitioners do not seek a Writ of Certiorari as to this portion of the Sixth Circuit's decision.

has been equally vigilant in protecting non-minority individuals from those same arbitrary racial classifications which formerly stigmatized African-Americans. In *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561 (1984), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Supreme Court struck down racial preferences and set-asides which accorded African-American employees special protection from layoffs, thereby exposing non-minority employees to layoffs they would never have undergone by customary operation of the public employers' layoff policies.

In *Regents of University of California v. Bakke*, 438 U.S. 265, 320 (1978), the Supreme Court ruled unconstitutional the set-aside program adopted by a state university medical school which reserved a certain predetermined number of slots in an entry-level medical school class for minorities, thereby excluding a non-minority individual, who, but for such a set-aside, would have been admitted to the school. *Bakke* is essentially identical to the instant claim, except that *Bakke* was applying to medical school while Petitioners were applying for a job.

In *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) this Court was presented with its most recent opportunity to rule on the issue of racial classifications which work to the detriment of innocent non-minorities. The *Croson* Court struck down Richmond's racial set-asides, which mandated that minority owned paving contractors have a certain predetermined number of city paving contracts that otherwise may have been competed for by non-minority contractors. *Id.* at 511.

The common thread running through all of these cases has been this Court's inherent reluctance to permit race-conscious remedies to redress under-representation of African-Americans in public employment, academia, or commercial dealings with public sector entities, absent some showing of prior discrimination against them. *See Croson*, 488 U.S. 469 (1989); *Wygant*, 476 U.S. 267 (1986); *Stotts*, 467 U.S. 561 (1984); *Bakke*, 438 U.S. 265 (1978). However, this Court has never directly addressed the issue of racial set-asides or quotas in the context of hiring practices of such public sector entities, the very issue these Petitioners bring before this Court. If racial classifications which operate to the detriment of minority individuals are odious and inherently suspect, hiring quotas or set-asides which operate to the detriment of non-minority individuals should be regarded with the same degree of suspicion and subject to the same strict scrutiny.

This Court in *Wygant* touched on, but did not resolve, this issue. *Wygant* contains *dicta* to the effect that applicants for public employment may enjoy a lesser degree of constitutional protection than do incumbent employees. *Wygant*, 476 U.S. at 282. The Court never defined or quantified this "lesser degree." However, in *Croson*, this Court hinted that public entities would be subject to the same constitutional strictures, whether they were dealing with incumbent public employees or job applicants. In *dicta*, this Court indicated that, in the case of jobs requiring special qualifications there must be a showing of a disproportionate relationship between the percentage of minorities selected for jobs and the percentage of minorities in a qualified applicant pool to justify hiring quotas.

Croson, 488 U.S. at 501. This uncertainty, in the wake of *Wygant* and *Croson*, as to the extent of constitutional protection afforded applicants for public employment, underscores the need for further Supreme Court elucidation.

The resolution of this hiring issue is vital. The employment of racial quotas and set-asides in the recruitment and hiring of firefighters, police officers, teachers, and other public employees throughout the country continues to engender substantial controversy and litigation, as evidenced by the countless public employers which have grappled with this issue. Disputes over the legality of racial set-asides in the hiring of firefighters and police officers alone have spawned litigation in numerous federal courts throughout the country: *Martin v. Wilks*, 490 U.S. 755, *reh'g denied*, 492 U.S. 932 (1989); *Officers For Justice v. Civil Service Com.*, 979 F.2d 721 (9th Cir. 1992); 1992 U.S. App. LEXIS 28,756 (1992), *petition for cert. filed* (1993); *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1948 (1992); *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 969 (1992); *Barfus v. Miami*, 936 F.2d 1182 (11th Cir. 1991), *reh'g en banc, denied*, 951 F.2d 1265 (11th Cir. 1991); *Donaghy v. City of Omaha*, 933 F.2d 1448 (8th Cir. 1991), *reh'g en banc, denied*, 1991 U.S. App. LEXIS 17,972 *cert. denied*, ___ U.S. ___, 112 S.Ct. 938 (1992); *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991), *on remand*, 777 F.Supp. 1382 (6th Cir. 1991); *Paganucci v. New York*, 785 F.Supp. 467 (S.D. NY 1992); *Quirin v. City of Pittsburgh*, 801 F.Supp. 1486 (1992); *Police Association of New Orleans v. Civil Service Commission*, Civil

Action No. 90-4850 (E.D. La. 1991); *Pennsylvania v. Flaherty*, 760 F.Supp. 472 (W.D. Pa. 1991).

Unless this Court addresses and strikes down the race-segregated, dual-list scheme implemented by the City, not only will Petitioners be deprived of their valuable property rights to public employment, the Sixth Circuit decision, along with other similar circuit court decisions will operate to deprive countless qualified non-minority individuals throughout the country of careers in public employment because of their race. By the same token, numerous African-Americans are stigmatized by the suspicion of their co-workers that they could not make it on their own merit. *Croson*, 488 U.S. at 721, 733, 739; *Bakke*, 438 U.S. at 298; *Krupa v. New Castle County*, 732 F.Supp. 497, 516 (D. Del. 1990).

II. QUESTION PRESENTED FOR REVIEW

1. **Absent some showing of the present effects of past discrimination, may a city constitutionally employ racial quotas, setting aside a predetermined number of positions in a fire division recruit class solely for African-American applicants, in order to meet the goals of a Consent Decree notwithstanding the use that this quota, denies positions in the recruit class to non-minority applicants solely because of their race?**

    a. ***Respondents' use of a dual hiring list is a racial classification forbidden by the Equal Protection Clause of the 14th Amendment of the United States Constitution, absent some showing of the present effect of prior discrimination.***

It is a long-standing principle of constitutional law that "[a]ny preference based on racial or ethnic criteria

must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980). Additionally, any classification "must be justified by a compelling government interest." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

One such "compelling government interest" that has always been recognized is the elimination of past discrimination. In this regard, past discrimination can be shown in one of two ways:

1. A showing that the public employer was engaged in intentional race discrimination. *Washington v. Davis*, 426 U.S. 229 (1976); or

2. Valid statistics which would establish discrimination. *Croson*, 488 U.S. at 501; *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977). *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n. 20 (1977).

In this case, there is no admission of discrimination. In fact, there is clear language in the *Youngblood* Consent Decree wherein the City denies having engaged in race discrimination. (App. 32). Nor was there a judicial finding of discrimination. The *Youngblood* Consent Decree was entered into to preclude litigation on that very issue.

The only other method to establish past discrimination is through the use of statistics. Petitioners readily concede that a statistical analysis may be a useful tool to establish discrimination. However, no statistics were ever provided by Respondents. Where the at-issue jobs are not unskilled, but rather skilled, such as the fire recruit jobs

at issue herein, one must undertake a statistical analysis comparing the percentage of minorities in the at-issue jobs with a qualified labor pool. *Croson*, 488 U.S. at 501; *Hazelwood*, 433 U.S. at 308. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 650 (1989).[7]

Hazelwood is instructive. At issue in *Hazelwood* was whether a school district in suburban St. Louis discriminated in the hiring of black teachers. *Hazelwood*, 433 U.S. at 301. In determining that it did, the Supreme Court compared the percentage of black teachers in the Hazelwood School District with the percentage of black teachers in the entire St. Louis Metropolitan area. *Id.* at 308, n. 13. Because the percentage of black teachers in Hazelwood was far lower than the percentage of black teachers in the St. Louis Metropolitan area, the Supreme Court concluded that the Hazelwood School District had indeed discriminated. *Hazelwood* 433 U.S. 299.

The unique statistical methodology applied in skilled-position cases, like *Hazelwood*, was echoed by this Court in *Croson*:

> In the employment context, we have recognized that for certain entry level positions or positions

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[7] It is undisputed that only one in ten applicants pass all of the requirements and make the hiring lists. Prior to sitting for and passing a rigorous written examination, potential recruits must also pass a physical ability test, polygraph test, background check, criminal record search, and physical and psychological examination. Respondent's City Personnel Specialist stated in her deposition that only ten percent (10%) of those who actually sign up as recruit candidates make it all the way to the hiring list (App. 61). Ninety percent (90%) of those who begin the process are winnowed out along the way.

> requiring minimal training, the statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population *may* be probative of a pattern of discrimination . . . *But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.*

Croson, 488 U.S. at 501-502 (emphasis added); *See also Wards Cove Packing Co. v. Atonio*, 490 U.S. at 650 (1989).

The Sixth Circuit had no such detailed statistical analysis to review. In fact, there was no statistical evidence upon which to base the dual lists. The Sixth Circuit merely stated that "the statistical inquiry here compares the racial composition of the City's Fire Division with that of the relevant *qualified labor market.*" (App.21). (Emphasis added.) The Sixth Circuit also noted that "[t]his court has already recognized that *the manifest imbalance in the Fire Division* with regard to racial composition justified the 1974 order implementing the decree" (App. 21-22).

However, at no time did the Sixth Circuit bother to identify the "relevant qualified labor market". It posited no statistical comparison whatsoever demonstrating an imbalance between the number of African-Americans in the Fire Division in 1974 and any qualified labor market. Thus, the Sixth Circuit decision failed to follow the standards set forth in *Croson*, 488 U.S. at 501-502 and *Hazelwood*, 433 U.S. at 308.

Furthermore, merely reciting that there is a "manifest imbalance" in the Fire Division is hardly tantamount to a

statistical finding of discrimination. Again there was never a pre-1974 empirical study or comparison, under the *Hazelwood, Croson,* and *Wards Cove* case formula, between African-Americans in the Fire Division, or the Fire Division Recruit Class, with a labor pool of individuals who were qualified to become fire recruits within the metropolitan Cincinnati area.[8]

The Sixth Circuit draws heavily on its own decisions in *Youngblood v. Dalzell* to support its finding that a statistical case of discrimination has existed. *Youngblood v. Dalzell,* 925 F.2d 954 (6th Cir. 1991); *Youngblood v. Dalzell,* 804 F.2d 360 (6th Cir. 1986); *Youngblood v. Dalzell,* 568 F.2d 506 (6th Cir. 1978). However, nothing in the long series of *Youngblood* decisions suggests a statistical imbalance under the *Hazelwood* or *Croson* formula to justify a finding of past discrimination. Indeed, the only statistics relied upon by the Sixth Circuit in *Youngblood* are those which compare the pre-1974 number of African-Americans in the Fire Division with the pre-1974 number of African-Americans *in the general population of the City of Cincinnati. Youngblood,* 925 F.2d at 955.

The mere comparison of minorities in at-issue jobs with minorities in the general population has long been disfavored by this Court as a method of demonstrating

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[8] This Court recently refused to grant a Writ of Certiorari in the case of *Vogel v. City of Cincinnati* No. 91-2001. That case was substantially different from this, in that there was clear and admitted evidence of discrimination against women and statistical evidence offered of discrimination against African-Americans. In this matter, no evidence of any nature was presented upon which the decree could be based.

past discrimination. *Croson*, 488 U.S. at 501; *Hazelwood*, 433 U.S. at 308 n. 13. Such a comparison will, at most, demonstrate societal discrimination, and perhaps demonstrate only that minorities in question tend to pursue careers other than firefighter. It does not demonstrate that the City is responsible for the low numbers of minorities in the fire division. Thus, the Sixth Circuit's basis for finding past discrimination as a pre-requisite to justifying race-conscious relief in this case is wholly inconsistent with established Supreme Court methods for determining whether there is a present effect of prior discrimination.

b. ***Petitioners have been deprived of their right to equal protection under the Fourteenth Amendment of the U.S. Constitution irrespective of whether or not the fire recruit test scores were validated.***

The Sixth Circuit clearly erred when it held that the written recruit examination was not validated in accordance with EEOC guidelines. (App. 23). Respondent City Personnel Specialist Carol Callahan stated in discovery that the test was validated and explained the method of validation. (App. 57-58).

The Sixth Circuit further held that since the test *scores* were not validated so as to predict a significant difference in job performance by recruits, Petitioners could not assert an equal protection claim based on their rejection for admission to the recruit classes, even though African-Americans who scored lower on the test were admitted. The import of the Sixth Circuit's decision is that, without score validation, relative scores mean nothing, and all

who scored with a passing grade or above were "equally qualified."

Such a holding would sanction quotas as a redress for societal discrimination. Since the exam is already "content" validated, score validation would do nothing more than recognize that a written exam, *per se*, may be "culturally biased". This is what Intervening Respondents have argued; an argument with which the Sixth Circuit apparently agrees. (App. 60). Under such a doctrine, societal discrimination, could be used to force the innocent public employer to implement a race-conscious quota, with its obvious impact on innocent non-minority individuals.

Even if the relative test scores among recruit class applicants are meaningless, as the Sixth Circuit decision suggests, the decision below nonetheless misconstrues Petitioner's argument. The gravamen of Petitioner's case is not simply that African-Americans with lower scores were admitted into the class. Petitioners challenge the City's reservation of a pre-determined number of positions in a recruit class for African-American applicants, irrespective of test scores.

Even if the test were "pass-fail", similar to a physical agility test or a psychological test, and all the individuals who passed the exam were equally qualified, Respondent City can not arbitrarily set aside a certain number of slots for African-Americans. This is no less a blatant racial set-aside than the minority business set-aside which was roundly condemned by the Court in *Croson* or the medical school set-aside in *Bakke*. *Croson*, 488 U.S. 469 (1989); *Bakke*, 438 U.S. 265 (1977).

c. ***Applicants for public employment do not possess a lesser degree of constitutional protection against deprivation of equal protection than do incumbent public employees.***

Relying upon *Wygant*, the Sixth Circuit decision denigrated Petitioners' status as that of mere applicants for employment, who were deserving of lesser constitutional protection than incumbent employees. (App. 21). The Sixth Circuit not only stretched the dicta of *Wygant*, but ignored the language of *Croson* and *Bakke*. In *Wygant* this court did not state that applicants for public employment possess no constitutional rights. Were that the case, public employers could, with impunity, maintain a blatant policy of excluding African-Americans from various jobs. Not only would such a racial screening device violate numerous federal statutes dealing with employment discrimination, but would also offend the Fourteenth Amendment.

Historically, this Court has vigorously safeguarded the rights of "outsiders" who were being denied property rights on the basis of their race, even in those rare cases, like this one, where the victims are being deprived of their rights because of their *non-minority* status. In *Bakke*, a white applicant's status as an "outsider" did not bar him from successfully challenging the racial quotas of the state medical school which prevented his admission. *Bakke*, 438 U.S. 265. Similarly, in *Croson*, a non-minority owned paving contractor successfully challenged the constitutionality of a minority business set-aside program, the operation of which prevented it from obtaining paving contracts from the City of Richmond. *Croson*, 488 U.S. 469.

Petitioners in this case are all non-minority individuals who fulfilled the City Fire Division's selection criteria and received scores that would have placed them in the recruit class under operation of state law. They are just as much "outsiders" as were the plaintiffs in *Bakke* and *Croson*. To the extent that the Sixth Circuit decision below interprets *Wygant* as suggesting a dramatic relaxation of constitutional protection for mere applicants for employment, *Croson* and *Bakke* suggest no relaxation at all.

Further, these Petitioners are not an undefined mass of individuals applying for some theoretical entry level position. All of them have survived a gauntlet of rigorous statutorily mandated screening steps ranging from physical exams and agility tests to psychological profiles and criminal background checks. They have all taken and scored very well on a written examination. Ohio law requires admittance of fire recruit candidates in order of excellence as shown by their test scores. Therefore, Petitioners had every right to expect that they would be hired as fire recruits based on state statute. Their property right deprivation is hardly theoretical.

Moreover, the harm Petitioners have suffered is substantial. This is not a case where one's promotion or placement into an apprenticeship program, or one's promotion has been merely delayed. Petitioners have been denied employment altogether.

As if to minimize the harm done to Petitioners, the Sixth Circuit notes that some of them ultimately achieved entry into a subsequent recruit class. This is beside the

point. Many other Petitioners did not achieve entry. Having been barred from entry into the Fire Recruit Class, many Petitioners were forced by economic necessity to choose careers elsewhere. Others, who would have been accepted in one class have been precluded from subsequent classes by operation of the unlawful quota. Therefore, the city's racial quota results in an irreparable loss of employment.

Even for those fortunate enough to achieve entry into a subsequent class, their harm, too, is irreparable. For the remainder of their careers in the Fire Division, these Petitioners will always possess less seniority than they would have possessed had they been admitted into the first recruit class. They will be more vulnerable to lay offs and will also lag behind their peers in the accumulation of time-in-grade, which is a prerequisite to the taking of promotional examinations.

d. ***Respondent City's mere desire to increase minority participation in its Fire Division was not a sufficiently overwhelming and compelling governmental interest to justify the imposition of race-based quotas.***

Petitioners herein do not attack the concept of affirmative action, nor do they ask this Court to find affirmative action in a general sense to be unconstitutional. The *Youngblood* Consent Decree itself contains many constructive measures for achieving its goals for bringing African-Americans into the fire division. It provides for aggressive recruiting in the minority media, elimination of irrelevant screening criteria which act as built-in barriers to

minority participation, and other useful measures. (App. 34-37). Other affirmative measures could have been implemented which did not adversely impact non-minorities. In *Bakke*, this Court noted with approval the state medical school's award to minority applicants of certain "quality points", similar to a veteran's preference, to augment their test scores. *Bakke*, 438 U.S. at 317.

However, Respondent City went too far when it created the dual-hiring list with its racial quotas. This Court has repeatedly condemned such racially discriminatory measures, notwithstanding the good faith intentions of the political subdivisions which implement them.

In striking down the racially-based minority business set asides in *Croson*, this Court noted the absence of a finding that the City of Richmond ever discriminated, or even a statistical finding that a disproportionate number of minority paving contractors who were *qualified* to receive city contracts did not get them. Writing for the plurality Justice O'Connor stated:

> Absent searching judicial inquiry into the justification for such race based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.

Croson, 488 U.S. at 493.

> That Congress may identify and redress the effects of society wide discrimination does not mean that, *a fortiori*, the states and their political subdivisions are free to decide that such remedies are appropriate . . .

> The mere recitation of a benign or compensatory purpose for the use of a racial classifications would . . . insulate any racial classifications from judicial scrutiny.

Id. at 490.

In so holding, the Supreme Court was merely echoing the sentiments which have been articulated by this Court in other affirmative action cases, wherein race-conscious classifications were struck down. *See Johnson v. Transportation Agency,* 480 U.S. 616, 637-638 (1987); *Wygant v. Jackson Board of Education,* 476 U.S. at 276.

In *Regents of the University of California v. Bakke,* as in the instant case, there was never a finding, either statistical or otherwise, of discrimination by the public entity, only a well-meaning desire to increase minority enrollment in the medical school. The language of *Bakke* in striking down these set-asides is equally applicable here.

> Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids . . .
>
> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations.

Bakke, 438 U.S. at 307. This is precisely what the Sixth Circuit has done here. In its zeal to vindicate Respondent City's right to carry out its admirable goal of increasing minority participation in the Fire Division, the Sixth Circuit Court below has allowed Respondent City to run

roughshod over Petitioner's constitutional rights. This is a gross constitutional deprivation which warrants review by this Court.

e. *The Sixth Circuit's refusal to find that Petitioners' constitutional rights to equal protection were violated is in conflict with decisions of other circuits.*

Racial set-asides, absent discrimination, have been condemned by at least two circuits as violative of non-minority applicants' rights to equal protection as guaranteed by the Fourteenth Amendment. *Commonwealth v. Flaherty*, No. 92-3031, ___ F.2d ___, 1993 U.S. App. LEXIS 819 (3d Cir., Jan.20, 1993); *Ledoux v. District of Columbia*, 820 F.2d 1293, 1302 (D.C. Cir. 1987). In *Flaherty*, the Third Circuit struck down a race-conscious quota implemented by the City of Pittsburgh to remedy statistical disparities. While the results of a content-validated hiring examination did result in a disproportionate impact on minorities, there was no evidence the statistical disparities were caused by discrimination. *Flaherty*, No. 92-3031, ___ F.2d ___, 1993 U.S. App. LEXIS 819 (3d Cir., Jan. 20, 1993); *See Krupa v. New Castle County*, 732 F.Supp. 497, 512-513 (D. Del. 1990) (many reasons other than discrimination exist for statistical disparities; absence of sufficient statistical showing of discrimination to support set-asides).

The District of Columbia Circuit in *Ledoux* stated that it was not prepared to embrace an affirmative action plan that completely forecloses employment to some non-minority or male candidates. *Ledoux*, 820 F.2d at ___. Even where pre-1972 discrimination was conceded, a one-third

quota for female firefighter applicants was overturned because it was not narrowly tailored. *Quirin v. City of Pittsburgh*, 801 F.Supp. 1486 (1992).

However, the Sixth Circuit has not been the only circuit to uphold a political subdivision's use of dual hiring lists to staff its recruit classes for fire, police, or other protective services. A Constitutional challenge to this practice also failed in *Donaghy v. City of Omaha*, 933 F.2d 1448, 1461 (8th Cir., 1991). *See also, Billish v. City of Chicago*, 962 F.2d 1269 (7th Cir. 1992) (where dual lists in promotions were upheld)[9]; *Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992) (where lower scoring minority recruits were hired where there was a finding of discrimination).

Granting of this Petition for Writ of Certiorari is especially warranted where, as here, there exists a conflict between the circuits, as to the constitutionality of racial set-asides for the hiring of public employees. The Supreme Court should resolve this conflict.

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[9] Plaintiffs' motion for hearing *en banc* was recently granted by the Seventh Circuit and oral argument held. The Seventh Circuit has not yet handed down a decision to date.

CONCLUSION

For all the reasons set forth herein, it is respectfully submitted that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY JANSEN, ET AL.,

Plaintiffs,

v.

CITY OF CINCINNATI,

Defendants,

Civil No.
C-1-89-079
C-1-89-479
C-1-90-151

ORDER

This matter is before the Court on cross-motions for summary judgment the determination of which will by agreement of counsel be dispositive of the issues in this matter. Plaintiffs assert that a Consent Decree entered into in 1974 has by its operation denied them of rights conferred by the laws of the State of Ohio. In accordance with Rule 52, Fed. R. Civ. P., the Court does hereby set forth its Findings of Fact, Opinion and Conclusions of Law.

I.

FINDINGS OF FACT

1. There is no factual dispute between the parties and the following recitation of facts is intended more for background than any judicial determination by the Court.

On May 7, 1974, in the case of *Tilford Youngblood v. John Dalzell*, Civil No. 8774, parties entered into a Consent

Decree determining hiring and promotions in the City of Cincinnati Fire Division.

2. Of significance to the matter before the Court are the following:

A. Consent Decree, paragraph 22: "Subject to the availability of qualified applicants, defendant shall adopt and seek to achieve a goal of hiring sufficient numbers of qualified minority persons to achieve a work force composition which will not support any inference of racial discrimination in hiring. *Such goal shall be deemed to have been achieved when at least eighteen percent (18%) of the Division of Fire Personnel of the City of Cincinnati are minority persons.*" (Emphasis added)

Paragraph 22 continues by assigning numerical percentages and dates by which those percentages should be achieved. From a minimum of 4.2% by December 31, 1974, the "goal" proceeds to a maximum of 18% by December 31, 1980.

B. Paragraph 23 of the Consent Decree contains the following language:

> "Defendant shall be deemed to have sought to achieve each stage of the work force composition goals when and as the above percentages of Fire Division Personnel are minority persons . . . defendants shall be deemed to have sought to achieve each stage of the work composition goals *in good faith* if at least forty percent (40%) of the total fire recruit class for any given year consists of minority persons." (Emphasis added).

C. Ohio Revised Code § 124.26 enjoins upon the Civil Service Commission the following obligation: " . . . [it] shall prepare an eligible list . . . of such persons [who] shall take rank upon the eligible list as candidates in the order of their relative excellence as determined by the examination . . . "

D. Ohio Revised Code § 124.27 requires the Civil Service Commission to "certify to the appointing authority the names and addresses of the three candidates standing highest on the eligible list for the class or grade to which the position belongs; . . . the appointing authority shall notify the director of such position to be filled and he shall fill such position by appointing one of the three persons certified to him."[1]

3. The plaintiffs took an examination on January 30, 1988, for appointment to the Fire Division of the City of Cincinnati. Following grading of the examinations, the defendants proceeded in the following fashion:

A. Two lists of eligible persons were prepared: one known as the Fire Recruit Majority List for nonblack fire recruit candidates; and the other referred to as the Fire Recruit Minority List for black fire recruit candidates.

B. In advance of such examination defendants determined that 40% of the class would be taken from the Minority List and 60% would be taken from the Majority List.

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[1] This provision is sometimes referred to as "The Rule of Three."

4. The plaintiffs were all included in the Fire Recruit Majority List and none were appointed. Examinees on the Minority List who had scores below those of plaintiffs were appointed.

5. Since December 31, 1986, the staffing level of the Fire Division has consisted of 18% or more minority individuals.

II.

OPINION

A. Introduction

Any consideration of the problem presented herein must begin with an understanding of Civil Service. In the 1880's a society weary of public jobs filled by patronage and fed up with the adage: "To the victor belongs the spoils," gave sufficient support to the concept of Civil Service that Congress did in 1883 pass the first Civil Service bill. It was known as the Pendleton Act. It was named in honor of George Hunt Pendleton, a senator who resided in Cincinnati.

Civil Service began in the City of Cincinnati shortly before the outbreak of World War I. It became a basic part of city government in Article V of the City Charter adopted in 1926. Civil Service is based upon a simple concept: The public is entitled to the most qualified person in every appointive public job. The critical word is "qualified" and that term has been altered from time to time. Both the General Assembly of Ohio and the courts have varied that term as the needs of society have required. Shortly after WWI a determination was made

that those persons who had served in the military service were entitled to assistance in the awarding of Civil Service jobs. Such persons were given additional credit on passing scores[2]. This credit is known as "Veterans Preference," and did affect the definition of "qualified." There is nothing wrong with Veterans Preference. It is a legislative response to a perceived need by society in order properly to assist those people who had served their country in the military. It does, however, tend to penalize women in those situations where they compete with male veterans for appointment. In the absence of a universal draft, far fewer women have served in the military. The reference herein to Veterans Preference is merely to demonstrate that society, through its elected representatives, may change Civil Service concepts.

Such concepts may also be changed by a judicial response. Within the past 25 years society has perceived an unfair aspect of Civil Service as it affects blacks. The judicial solution was the application of "Affirmative Action". Minority persons were assisted in obtaining jobs under Civil Service, by further defining the word "qualified." In the matter at hand Affirmative Action was accomplished by the Consent Decree. Such Decrees have served a useful purpose. They are an accepted method and they have been approved by appellate courts. The Consent Decree herein was specifically approved by the United States Court of Appeals for the Sixth Circuit in *Youngblood v Dalzell*, 568 F.2d 506, (6th Cir. 1978).

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[2] "Veterans Preference" is currently set forth in Ohio Revised Code § 124.23.

However one describes the need and the merits of Consent Decrees, should not be unlimited and open end. They embody the immutable logic reffered to in the following quotation from *Alice in Wonderland:* "The more there is of mine, the less there is of yours."[3] With a limited number of jobs available, the selection of any applicant contrary to Ohio Civil Service law will require the penalizing of someone else.

B. The Consent Decree

The Consent Decree in this matter is almost fifteen years old. A consideration of it requires a careful examination of paragraphs 22 and 23 (Findings of Fact 2A and 2B). A distinction must be drawn between them. Paragraph 22 sets forth in specific terms the "goal" that the Consent Decree sought to achieve. That goal required 18% of the Division of Fire Personnel of the City of Cincinnati to be minority persons by December 31, 1980. It is irrelevant to this inquiry whether or not the goal was reached by that date. The critical date herein is August 7, 1988, when plaintiffs sat for the examination. On that date the goal had been reached.

Paragraph 23 does not set forth goals, it deals instead with a test for the good faith of defendant. The Court will take judicial notice that not all persons who apply are selected for a fire recruit class. Arguably, such persons could be rejected for discriminatory reasons and the goal of paragraph 22 never reached.

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[3] *The Annotated Alice,* Bramhall House, 1960. Pg. 122.

Paragraph 23 is what it appears to be. It sets forth an empirical standard whereby the good faith of the City of Cincinnati could be measured. It also protects the City against penalty if matters beyond its control prevented the achieving of the levels set forth in paragraph 22. The language of paragraph 23 is instructive and bears repetition. It provides in part:

> Defendants shall be deemed to have *sought* to achieve each stage of the work composition goals *in good faith* if at least forty (40) percent of the total fire recruit class for any given year consists of minority persons. (Emphasis added).

Somehow the simple English words have been construed to be an addendum to paragraph 22. If so, it is completely inconsistent with the "goal" of 18%. There is no language in the Consent Decree requiring the Fire Division at any time to consist of 40% minority persons. If the City of Cincinnati had elected in the Consent Decree or does elect in future Consent Decrees to establish that percentage, it may do so. The Fire Division may in fact reach that percentage, but under the current Consent Decree, it may not invoke judicial assistance to do so. The Court can only construe the existing Consent Decree which *in haec verbae* lists a maximum goal of 18%. There is no dispute among the parties that 18% had been achieved prior to the date on which these plaintiffs took the entrance examination.

The Court has previously noted that Consent Decrees are legal exercises of municipal power, but they should be strictly construed since they do supplant the statutory basis of Civil Service selection as set forth in Ohio Revised Code §§ 124.26 and 124.27.

Section 124.26 is particularly instructive since it imposes a mandatory duty upon a Civil Service Commission to rank the candidates "in the order of their relative excellence as determined by the examination . . . " Any judicial requirement that a public official avoid his mandatory duty should be carefully examined.

C. Strict Scrutiny

There is a thread that seems to run through the reported decisions of the Supreme Court on Affirmative Action that is instructive herein. Terms such as "searching examination," "strict scrutiny," and "narrowly tailored," recur with some frequency. For example, an agreement between a Board of Education and a Teachers' Union seeking to vary a lay-off policy by seniority which would impact unfavorably upon recently hired minorities was struck down by the Supreme Court in *Wygant v Jackson Bd. of Education*, 476 U.S. 267 (1986). In that case the following statement is made:

> In the context of affirmative action, racial classification must be justified a (sic) by a compelling state purpose and the means chosen by the state to effect that purpose *must be narrowly tailored.* (Emphasis added.)

In dealing with "set asides" of contracts for minorities, the Supreme Court of the United States in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) directed that such plans be subjected to "strict scrutiny." The Court determined that the plan in that case was "not narrowly tailored" and therefore not justified.

In a previous "set aside" case *Fullilove v. Klutznick*, 448 U.S. 448 at 491, the following appears:

> Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.

The Supreme Court specifically referred to a Consent Decree in *Firefighters Local Union v. Stotts*, 467 U.S. 561 at 574 in the following language:

> [the] "scope of a Consent Decree must be discerned from its four corners and not by reference to what might satisfy the purpose of one of the parties to it." *citing United States v. Armour & Co., 402 U.S. 673, 681-682 (1971).*

D. Limitation

It should be noted that the decision in this matter is a limited one. The Court finds only that the goal of the Consent Decree as it relates to hiring has been achieved. The City of Cincinnati is directed forthwith to abstain from any action to appoint fire recruits in violation of the requirements of the Civil Service laws of Ohio[4]. The Court does not find that the Consent Decree was improperly entered into or that any appointments thereunder are void. This holding does not invalidate any portion of the Consent Decree that deals with promotion since that issue is not involved herein. All persons who were

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[4] Ohio Revised Code § 124.90 provides a means whereby a city may waive, suspend, or alter the provisions of Chapter 124. Based upon advice from counsel the Court understands that such action has never been taken in regard to the Fire Division.

appointed to the Fire Division and who have not been separated therefrom have valid appointments and are entitled to all rights and benefits accruing from such appointment.

E. Remedy

The fashioning of an appropriate remedy for these plaintiffs is a difficult one. Since the Consent Decree is legal, valid and appropriate, any adverse effect upon such plaintiffs would appear to be noncompensable. The reality, however, is that the City of Cincinnati went beyond its obligations and in so doing adversely affected these plaintiffs in a limited fashion.

Under the Rule of Three, plaintiffs had no assurance of employment and should not now be employed retroactively with payments and benefits to which such employment might entitle them. The Court does direct the City of Cincinnati to "dovetail" these plaintiffs into the next list of Fire Recruits in the position their examination results would confer. Such list should be submitted to the Fire Chief for his consideration. An appointment under the Rule of Three, if any, would not be retroactive and plaintiffs would not receive seniority or benefits prior to the actual date of appointment.

As attorneys for a successful party in a civil rights action, plaintiffs' counsel are entitled to appropriate compensation. Such counsel are directed to submit to the Court within thirty days of the date of this Order an itemized list of time spent in order that fair compensation may be awarded.

It might appear that the City of Cincinnati has now been penalized twice. Undoubtedly, the City compensated adverse counsel who negotiated the Consent Decree. Now it appears that attorney fees will be awarded for a successful contest of that Consent Decree. The unfairness, however, is more apparent than real. The City of Cincinnati is not required to pay attorney fees for a successful contest of the Consent Decree. The Consent Decree per se has withstood such challenge and no counsel fees are payable therefore. Plaintiffs have only successfully objected to conduct beyond the Consent Decree. It is for that activity alone that the Court will award compensation. Since exceeding the Consent Decree was a voluntary act by the City of Cincinnati, it did in fact violate the civil rights of these plaintiffs.

III.

CONCLUSIONS OF LAW

A. This Court has jurisdiction pursuant to 42 U.S.C. § 1983.

B. A Consent Decree which provides for a favored treatment of minorities in order that the total employment percentage of that minority be increased is not per se invalid and represents an acceptable method of correcting a racial imbalance. *Youngblood v Dalzell,* 804 F.2d 360, (6th Cir. 1986).

C. Consent Decrees which operate to violate the Civil Service laws of Ohio must be strictly construed and not extended beyond the specific terms thereof. *Fullilove v. Klutznick,* 448 U.S. 448 at 491 (1980).

D. Where a stated percentage of minority employment has been achieved for a substantial period of time, that portion of a Consent Decree is at an end and may be terminated as to such hiring practices. *Board of Education of Oklahoma City Public Schools v. Dowell, Et al.*, 1991 U.S. Lexis 484; ___ U.S. ___ (1991).

E. A Consent Decree which includes both hiring and promotional practices is severable and a Court may terminate the hiring practices set forth therein while not affecting the validity of the promotional aspects of such Decree.

F. Where by statute successful candidates of a hiring examination are subject to the "Rule of Three," a remedy for successful plaintiffs may only place them back on an eligible list but not require the appointing authority to waive its rights under the Rule of Three.

G. In view of the foregoing, Plaintiffs' Motion for Summary Judgment is hereby GRANTED to the extent set forth herein. Defendants' motion for summary judgment is DENIED. Plaintiffs' counsel are entitled to appropriate compensation.

IT IS SO ORDERED.

/s/ Carl B. Rubin
Carl B. Rubin
United States District Judge

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 91-3498/3499/3500

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY JANSEN, DANIEL K. GOENS, ROBERT H. PRASSE, EVAN WOOD, and MARK E. MONAHAN;

WILLIAM NEAL, BRIAN CLEMENS, FRANK GORRASI, GREGORY HISSETT, and PHILIP S. RAMSTETTER;

DANIEL R. CORRY, NOAH A. GIBBS, IV, TIMOTHY P. BURWICK, LAWRENCE D. CAPPEL, ROBERT HART, JEFFREY H. SWEET, MARK E. KREIMER, NICHOLAS SCHIBI, and TIMOTHY A. CUNNINGHAM,

Plaintiffs-Appellees, Cross-Appellants (91-3500),

v.

CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION, WILLIAM MILLER, and NORMAN WELLS,

Defendants-Appellants (91-3498), Cross-Appellees,

TILFORD YOUNGBLOOD, RALPH NICHOLS, and THE PLAINTIFF CLASS CONSISTING OF BLACK APPLICANTS FOR AND BLACK EMPLOYEES OF THE DIVISION OF FIRE OF THE CITY OF CINCINNATI,

Intervenors-Appellants (91-3499), Cross-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed October 13, 1992

Before: KEITH and MILBURN, Circuit Judges; and WOODS, District Judge.[1]

DAMON J. KEITH, Circuit Judge. The Several appeals in the present action arise from the March 18, 1991, order from the Southern District of Ohio, which dissolved a portion of a 1974 consent decree entered into by the City of Cincinnati (hereinafter "the City"). The decree sets forth a plan for the recruitment, hiring, and promotion of minority fire division personnel. For the reasons stated below, we VACATE the order and REMAND the case to the district court for further proceedings consistent with this opinion.

I.

The City, the Legal Aid Society and the Ohio Attorney General entered into a Consent decree that was approved by the United States District court, Southern District of Ohio, in May 1974. The decree sets forth various steps to be taken by the City for the purpose of integrating its Fire Division. The decree contains provisions regarding the advertisement of job openings to reach minority applicants, the recruitment, hiring, promotion of minorities within the Fire Division and overall

[1] The Honorable George E. Woods, United States District Judge for the Eastern District of Michigan, sitting by designation.

record keeping. With respect to hiring, the City agreed to pursue an overall workforce composed of eighteen percent minorities. Paragraph 22 of the decree states in pertinent part:

> Subject to the availability of qualified applicants, Defendants shall adopt and seek to achieve a goal of hiring sufficient numbers of qualified minority persons to achieve a work force composition which will not support any inference of racial discrimination in hiring. Such goal shall be deemed to have been achieved when *at least eighteen (18) percent of the Division of Fire Personnel of the City of Cincinnati are minority persons.* In order to reach this goal, Defendants shall adopt and seek to achieve a goal of hiring sufficient minority persons so that the personnel in the Division of Fire will be:
>
> 4.2 % Minority by December 31, 1974
>
> 6 % Minority by December 31, 1975
>
> 8 % Minority by December 31, 1976
>
> 10.5 % Minority by December 31, 1977
>
> 13 % Minority by December 31, 1978
>
> 15.5 % Minority by December 31, 1979
>
> 18 % Minority by December 31, 1980
>
> (emphasis added).

Paragraph 23 states further:

> Defendants shall be deemed to have sought to achieve each stage of the work force composition goals when and as the above percentages of the Fire Division personnel are minority persons either on or within one month before or after the

> above dates; provided, however, that Defendants shall be deemed to have sought to achieve such stage of the work composition goals in good faith *if at least forty (40) percent of the total recruit class for any given year consists of minority persons* (emphasis added).

To achieve the hiring goals of this consent decree, the City has implemented a procedure which creates two lists for hiring consideration. The Fire Recruit Majority List consists of those non-minority candidates who have successfully completed all phases of the Fire Recruit selection process. The Fire Recruit Minority List consists of those minority candidates who successfully completed all phases of the Fire Recruit selection process. The City has taken sixty (60) percent from the majority list and forty (40) percent from the minority list to accomplish the stated forty percent objective of paragraph 23 of the Consent decree.

> Paragraph 27 of the Decree further mandates the following:
>
> Defendants shall use a system for promoting qualified minority persons within the ranks of the Division of Fire to achieve a goal of a work force composition which negates any inference of an unlawfully discriminatory promotion policy based on race.

The last sentence of the consent decree states: "At any time after the objectives of this decree have been achieved, the Defendants may move this Court, on due notice, for dissolution of the Decree." The City has not moved the district court for dissolution of the consent decree and has indicated that it does not intend to do so. Accordingly, all of the terms of the Decree remained in

effect at the commencement of this litigation. *See Youngblood v. Dalzell,* 123 F.R.D. 564 (S.D. Ohio 1989).

The Cincinnati Fire Division's selection process is an extensive multi-step process to assess the qualifications of applicants. The total process consists of a written examination, a physical ability test, a medical examination, a background investigation, and a psychological evaluation. A score of seventy (70) or above on the written examination is passing. Each of the other components are scored pass/fail.

After the applicants successfully advance through the first five steps of the selection process, they are then placed on an eligible list and certified to the Fire Chief for consideration for hiring under the "Rule of Three" process of the Ohio Civil Service Commission. Ohio Rev. Code § 124.27. The Rule of Three permits the Fire Chief to select a candidate for hiring from the top three people on the eligible list. It does not guarantee employment to those ranking highest on a given eligibility list, but merely guarantees hiring consideration.

The three cases at issue herein were consolidated by orders of the district court due to the identical nature of the claims of the plaintiffs in all of the cases.[1] All three classes of plaintiffs were white applicants for the position of fire recruit. They each claim they were wrongfully denied such positions in the recruit classes between 1988

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[1] The plaintiffs in *Jansen v. City of Cincinnati* claim they were wrongfully denied hiring from the fire recruit class in 1988. The plaintiffs in *Neal v. City of Cincinnati* and *Corry v. City of Cincinnati* claim that they were wrongfully denied hiring in classes in 1989 and 1990.

and 1990. Plaintiff's argue principally that since they scored higher on the Civil Service examination than any of the minorities appointed under the terms of the Decree, they should have been hired. The plaintiffs sought relief in the form of immediate job placement in the fire department and backpay from the date of the alleged discrimination. We note that, of the fifteen plaintiffs in this consolidated action, nine have been hired by the Cincinnati Fire Division as recruits in subsequent recruit classes.

In addition, this Court previously granted the petition to intervene filed by a class consisting of black applicants and black employees of the Fire Division (collectively "Intervenors"). The Intervenors claim that the city has engaged in racially discriminatory hiring practices in the past few years. *See Jansen v. City of Cincinnati*, 904 F.2d 336 (1990).

In the proceeding at bar, the district court made certain findings of fact and conclusions of law. The court first found that the "maximum goal of 18%" in the consent decree had been achieved in 1986. The district court then found that the implementation of the dual list was not authorized by the wording of the consent decree. Accordingly, the district court held: "Where a stated percentage of minority employment has been achieved for a substantial period of time, that portion of a Consent decree is at an end and may be terminated as to such hiring practices." The district court then dissolved the hiring provision of the decree and held that this paragraph was severable from the rest of the decree. Additionally, the district court noted that, because the process is "subject to the 'Rule of Three', a remedy for successful

plaintiffs may only place them back on an eligible list but not require the appointing authority to waive its rights under the Rule of Three." The court, thereby, denied plaintiffs' request for job placement and backpay. Furthermore, the district court ignored the claims of racial discrimination in the selection process made by the Intervenors when it dissolved the hiring provision.

The respective parties appealed from each adverse ruling. Because the district court's interpretation of Paragraph 22 contravenes the original stated purpose of the consent decree, we REMAND the case to the district court for proceedings consistent with this opinion.

II.

On appeal, the plaintiffs principally argue that the district court did not provide a sufficient remedy to compensate them for the grieved wrong. They also argue that the City's implementation of the dual lists to fulfill its obligations under the decree involved the use of impermissible quotas. Because the remedy necessarily depends on the asserted right, we first address the validity of the City's utilization of dual lists in hiring fire recruits.

This Circuit has recently set the parameters within which we review challenges to consent decrees in *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992). The *Vogel* Court stated:

> [A] consent decree, although in effect a final judgment, is a contract founded on the agreement of the parties. . . . It should be construed to preserve the position for which the parties bargained. . . . A consent decree "is not enforceable

> directly or in collateral proceedings by those who are not parties to it. . . . " It "may be challenged only on the ground that its substantive provisions unlawfully infringe upon the rights of the complainant." . . .
>
> . . . To have standing, a party must be aggrieved by the judicial action from which it appeals. . . . Regardless of how moderate a preference the decree accords women and minorities, if there is some detriment to the party challenging the decree, that party has sufficient standing to challenge the decree. Moreover, in the recent case of *Martin v. Wilkes*, 480 U.S. 755 (1989), the Court adhered to the general rule that a party cannot be deprived of rights at a proceeding to which he is not a party. The (Supreme) Court held in *Martin*, that people who are not made a party to a consent decree have standing to commence an action challenging the constitutionality of the decree as it is applied to them.

Vogel, 959 F.2d at 598-99 (citations omitted).

Analyzing the facts of this case in accordance with *Vogel*, these plaintiffs lack standing to challenge the City's interpretation of the consent decree. Moreover they lack standing to have that decree interpreted upon their own terms. Our review is thus limited to the plaintiffs' challenge to the constitutionality of the decree as it is applied to them. With that premise, we evaluate the City's fire division consent decree and the district court's interpretation of that decree in its order of March 18, 1991.

A.

The City's implementation of the consent decree has resulted in their adoption of what has traditionally been

termed an affirmative action plan. *See, e.g., Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986). The Supreme Court has recently determined that in our review of a race-conscious affirmative action program, we must evaluate the implemented scheme under strict scrutiny. *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 274 (1986) *See generally, City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Any such classification must be narrowly tailored to achieve the stated objective and that objective must be compelling. *Wygant*, 476 U.S. at 274. In our review of affirmative action plans, this Circuit has noted that "although initial employment opportunities coupled with hiring goals may burden some innocent individuals, they do not impose the same type of intrusive injuries that layoffs, which result in loss of job expectancy, security, and seniority, involve." *Long v. City of Saginaw*, 911 F.2d 1192, 1196-97 (6th Cir. 1990) (citing *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 283 (1986)).

While a strong evidentiary basis must exist to conclude that remedial action in the form of affirmative action is necessary, "evidence of wide statistical disparities . . . may justify an affirmative action policy adopted by a public employer." *Wygant*, 476 U.S. at 274-75. The statistical inquiry here compares the racial composition of the City's Fire Division with that of the relevant qualified labor market. *Vogel*, 959 F.2d at 599-600 (citing *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 274 (1986) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)). This Court has already recognized that the manifest imbalance in the fire division with regard to racial composition justified the 1974 order implementing the

decree. *See Youngblood v. Dalzell*, 804 F.2d 360, 364 (6th Cir. 1986).

Our second inquiry focuses on whether this affirmative action mechanism, employed since the inception of the consent decree and used in the selection process between 1988 and 1990, was narrowly tailored to accomplish the stated goal. This inquiry is of particular importance because it directly relates to whether the district court correctly dissolved the eighteen percent (18%) hiring goal of the consent decree in its February 1992 order.

In assessing whether the "dual list" procedure was narrowly tailored to accomplish the stated objectives of the consent decree, Justice O'Connor's comments in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) are instructive. Justice O'Connor wrote for a plurality of the Court:

> [T]he purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. This test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Croson, 488 U.S. at 493. We note further the Justice O'Connor, in *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986), found that the non-minority challengers of the affirmative action plan bear the burden of establishing that their constitutional rights have been violated. *Wygant*, 476 U.S. at 277-78, 293. We note that in the several appeals involving the city's Fire Division consent

decree that have come before this Court, this Circuit has validated, *sub silencio,* the City's use of dual lists for hiring purposes. *See Youngblood v. Dalzell,* 925 F.2d 954 (6th Cir. 1991); *Youngblood v. Dalzell,* 625 F.Supp. 30 (S.D. Ohio 1985), *aff'd,* 804 F.2d 360 (6th Cir. 1986), *cert. denied,* 480 U.S. 935 (1987).

The plaintiffs assert that, because the City did not elevate them to the eligible lists on the basis of ranked test scores and in accordance with the Civil Service Exam system, their constitutional rights were violated. Paragraph 25 of the consent decree is instructive with regard to the proper use of the written examination scores. Paragraph 25 states:

> In no event shall the Division of Fire be required to hire a person as a fire recruit who is not qualified. *Scores on selection procedures which have not been validated in accordance with the EEOC guidelines or scores on validated standards which are not sufficiently different as to predict a significant difference in job performance shall not be used in determining the qualifications of applicants.* A valid ranking of all applicants for the position of fire recruit is not prohibited by this paragraph. (emphasis added)

The decree clearly permits the use of properly validated test scores to rank recruits. These written examinations, however, have not been validated in accordance with EEOC guidelines. Moreover, no evidence has been presented to indicate that the scores which result "predict a significant difference in job performance."

The plaintiffs argue that the eligible list rankings for "Rule of Three" purposes are taken directly from the test

results. They argue that, because the Fire Division uses the test scores in this manner, there must be a necessary correlation between one's exam performance and one's job performance. While this may be a convenient method of elevating persons to the Rule of Three eligible list, there is no indication that the chosen fire personnel, who score higher on the exam, perform better on the job. The test merely ensures, as required by the consent decree, that each fire recruit is "qualified."

We further note that had the City not utilized the dual lists between 1988 and 1990 for hiring, significant under-representation of minorities in each class would have resulted. Absent the affirmative action procedure from 1988-1990, less than ten (10) of one hundred fifteen (115) applicants elevated for Rule of Three purposes would have been minorities. Utilizing the dual lists, however, the total number of minority hirees was consistent with the relevant pool of applicants in each of the three years.

Moreover, each of the minorities placed on the eligible list was qualified to be hired. Each applicant elevated to the Rule of Three stage and subsequently hired successfully completed each of the five components of the evaluation process. Each applicant was required to pass a security clearance and undergo physical, medical, and psychological evaluations. Additionally, as noted above, the written examination is only one of five components in the evaluation process, and the test was validated only as to content and not for rank order. Accordingly, these plaintiffs had no reasonable expectation that hiring would be solely on the basis of ranked exam scores.

For each of the above stated reasons, we hold that the use of the dual lists in implementing the consent decree is constitutional and did not abridge any of the applicants' constitutional rights. This holding is consistent with this Circuit's previous pronouncements regarding the validity of this consent decree.

B.

The district court's order appears to render the above discussion moot in light of three findings made by the district court. The district court first stated that "[s]ince December 31, 1986, the staffing level of the Fire Division has consisted of 18% or more minority individuals." It went further to state that "[t]he critical date herein is August 7, 1988, when plaintiffs sat for the examination. On that date, the goal (of 18%) had been reached." The district court then analyzed the hiring provisions of consent decree and found the following:

> Somehow the simple English words of paragraph 23 have been construed to be an addendum to paragraph 22. If so, it is completely inconsistent with the "goal" of 18%. There is no language in the Consent decree requiring the fire division at any time to consist of 40% minority persons . . . The Court can only construe the existing Consent Decree *in haec verbae* lists a maximum goal of 18%. There is no dispute among the parties that 18% had been achieved prior to the date on which these plaintiffs took the entrance examination.

Based on these findings, the district court stated that its holding was a "limited" one that "finds only that the goal

of the Consent decree as it relates to hiring has been achieved," and ostensibly dissolved only paragraph 22 of the consent decree.

We believe that the district court's "limited" order has misconstrued the essence of the affirmative action plan as envisioned by the parties. First, this Court finds no "maximum" goal stated in paragraph 22 of the Consent decree. We find only a target of "at least 18% that will not support any inference of racial discrimination in hiring." Furthermore, the language of paragraph 23 is not only congruous with the language of paragraph 22, but also sets forth the base formula which the City should use to ultimately attain the decree's goal of a balanced workforce in the City's Fire Division.

Furthermore, the district court failed to follow the dictates of *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 111 S. Ct. 630 (1991), and *Youngblood v. Dalzell*, 925 F2d 954 (6th Cir. 1991) In *Dowell*, the Supreme Court was faced with a school desegregation consent decree and its proper dissolution. The Court stated that the proper inquiry into the continued effectiveness of the consent decree was "whether the Board has complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable". *Dowell*, 111 S. Ct. at 638.

With regard to the overall interpretation of an adjudication of claims under this particular consent decree, this Circuit, in *Youngblood* stated:

> A key provision of the consent decree in this case is paragraph 34, governing continuing

jurisdiction of the court and duration of the consent decree. That paragraph provides that the court's jurisdiction over the case may be terminated when the defendants are shown to be in "compliance with [its] terms," and that the decree may be dissolved "after the objectives of this decree have been achieved." Relevant to the former clause, *this circuit has held that a district court may not close a case governed by a consent decree without addressing pending claims that the defendants have violated the decree. United States v. City of Cincinnati,* 771 F.2d 161, 168-69 (6th Cir. 1985). Relevant to the latter clause, the Supreme Court has held in the school desegregation context that where the defendant school district has achieved one of the objectives of a multi-faceted desegregation order, the district court's remedial authority with regard to that aspect of the school system is at an end and that part of the injunction must be dissolved. *Pasadena City Bd. of Educ. v. Spangler,* 427 U.S. 424, 436-37, 440 (1976).

Youngblood, 925 F.2d at 957-58 (emphasis added). The *Youngblood* Court further stated:

If the district court determines that in spite of the defendant's failure to achieve the specific terms of the consent decree in a timely fashion, the goal which the 18 percent requirement sought to achieve – the eradication of discriminatory hiring – has been achieved, then the court may dissolve that portion of the decree. In making this determination, the court must consider the argument in the plaintiffs' Motion to Modify that in the years since 1974, the racial composition of the City's work force has so changed that 18 percent minority hiring goal no longer is sufficient to dispel the inference that

> the City's hiring practices are discriminatory. Paragraph 34 of the consent decree allows the court to modify or amend the terms of the decree, and under *City of Cincinnati* the court's failure to consider such arguments would be erroneous. We emphasize again that this probing of the underlying goal of the decree is necessary before the decree is dissolved because . . . here the specific terms of the decree were not achieved by the deadline in the agreement and allegations of noncompliance have been raised. . . . *[T]he district court must look beyond the numerical term to the goal which that hiring requirement was designed to achieve. In deciding whether to close the case and dissolve the decree in its entirety, the district court must similarly consider the goal of negating any inferences of lawful discrimination in the recruitment, testing, and promotion of minorities in these areas, no specific numerical terms were established by the consent decree.*
>
> *Before the district court dissolves the decree, it must determine that the goals of the consent decree have been achieved and must consider all objections to such dissolution.*

Id. at 961 (emphasis added).

In light of the guidance given by the *Youngblood* Court, we agree with the City and Intervenors that the district court erroneously terminated the 18% hiring goal of the consent decree. The ostensibly "limited" district court order has far reaching consequences for the effectiveness of the remainder of the decree's provisions. Indeed, laying aside the possibility that the decree's hiring goal warrants modification, the stated hiring goal

directly impacts the promotional goals within the decree. Without a commitment to hiring a sufficient number of minority applicants, the pool of minority hirees from which the department could draw commanders and other supervisors will be diminished. The essence of paragraph 27, "to achieve a goal of work force composition which negates any inference of an unlawfully discriminatory promotion policy based on race," would undoubtedly be undermined by the court order and may open the City to further litigation. We find that the numerical goals in paragraph 22, to which the parties to the Consent decree agreed, are the lynchpin for accomplishing the overall objectives of the decree, and those goals cannot be dissolved lightly and without due consideration as to how the other provisions of the decree will remain effective.

Moreover, the *Youngblood* Court specifically stated that the consent decree must remain in effect until all of the objections to its dissolution have been considered and resolved. *See Youngblood*, 925 F.2d at 961. The Intervenors have asserted discrimination actions based on the City's hiring practices during the relevant period. *See Jansen v. City of Cincinnati*, 904 F.2d 336 (1990) (granting black firefighters the right to intervene). By neglecting these claims of discrimination, the district court has erroneously failed to determine "whether the vestiges of past discrimination had (indeed) been eliminated to the extent practicable." *See Board of Educ. of Oklahoma City Public Schools v. Dowell*, 111 S. Ct. 630, 638 (1991). The dissolution of the 18% hiring goal without addressing the Intervenors complaints is contrary to both the Supreme Court's overarching principle for evaluating consent

decrees announced in *Dowell* and this court's clear mandate in *Youngblood*.

III.

While we recognize that a consent decree operating in perpetuity may not be the most effective way to eradicate the evils of discrimination in the municipal workplace, we must remain true to the wording and intent of such decrees, until their goals are met. As a footnote, we also observe that the consent decree specifically provides for its own dissolution upon a proper motion by the defendant parties to the decree and that the city has not yet moved the court for dissolution of any portion of the decree. Given the intrinsic bond between the hiring and promotion goals of the consent decree and the district court's failure to address the Intervenor's claims with regard to the City's recent hiring practices, we must VACATE the district court's order and REMAND the case to the district court for proceedings consistent with this opinion.[2]

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[2] In light of the disposition of this case, this Court makes no determination as to the relief granted to the plaintiffs by the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TILFORD YOUNGBLOOD, et. al., Plaintiffs	)	Civil Action No. 8774
v.	)	
JOHN DALZELL, et. al, Defendants	)	CONSENT DECREE

I. Preliminary Statement

1. On March 30, 1973, Plaintiffs Tilford Youngblood and Ralph Nichols, on their own behalf and on behalf of all other persons similarly situated, filed their Complaint herein alleging that the Defendants were engaged in a pattern or practice of discrimination based on race in recruiting, testing, selecting, and hiring applicants for the position of fire recruit and in the promotion of firemen in the Division of Fire, Department of Safety of the City of Cincinnati, Ohio, in violation of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §§1981 and 1983, Article I, §2 of the Ohio Constitution, and Chapter 4112 of the Ohio Revised Code.

2. Plaintiffs seek declaratory and injunctive relief to permanently enjoin Defendants from engaging in racially discriminatory employment practices or policies in the recruiting, testing, selecting, and hiring of fire recruits and in the promotion of firemen.

3. Plaintiffs further seek affirmative relief to remedy the effects of past racially discriminatory employment practices in the Division of Fire.

4. On June 25, 1973, the Court permitted the Ohio Civil Rights Commission to intervene in this suit as a Party-Plaintiff pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

5. The Defendants deny that they have heretofore engaged in any pattern or practice of discrimination in recruiting, testing, selecting, and hiring fire recruits or in promoting firemen on the basis of race, but realize that certain past practices of the Division of Fire, Department of Safety and the Civil Service Commission of the City of Cincinnati, Ohio, may give rise to an inference that such pattern or practice may have occurred. For the purpose of avoiding any such inference, the Defendants have heretofore taken certain steps and promulgated certain policies intended to increase the availability and selection of qualified minority applicants for employment and promotion, and, for the same purpose and with the same intent, and being desirous of implementing a solution to the subject matter of this action without the expense of litigation, are now willing to agree to the entry of a Consent Decree providing for additional measures to be taken.

6. All parties mutually waive a hearing and findings of fact and conclusions of law on all issues and agree to the form of this Decree, and the Court having jurisdiction of the parties and subject matter of this action pursuant to 28 U.S.C. §§1343(3) and (4), it is mutually agreed that this Consent Decree shall be entered as a final binding order in this action from which no appeal shall be taken. Entry of this Consent Decree shall not constitute an admission by Defendants of any violation of law.

7. Definitions: "Minorities" as used in this order means black persons as set forth in the Complaint, Paragraphs 4,5 and 6. "The Parties" as used in this order means the Plaintiffs, the Defendants, and the Intervenors to this action. "Test" as used in this order means those selection procedures defined in 29 C.F.R. §1607.1 *et seq.* (1973).

II. Order

Therefore it is hereby ORDERED, ADJUDGED, and DECREED:

8. That the Defendants, their officers, agents, employees, successors, and all persons in active concert or participation with them are hereby permanently ENJOINED AND RESTRAINED from any act or practice which has the purpose or effect of wrongfully discriminating against any minority applicant or potential applicant, or any minority employee of, the Division of Fire, because of such individual's race, with respect to recruiting, testing, selecting, hiring, training, conditions of employment, and promotions and from engaging in any other acts or practices which have the purpose or effect of denying equal employment opportunities to minorities. In case of disagreement between the parties as to whether any act or practice has the purpose or effect of wrongfully discriminating against any minority applicant, potential applicant or minority employee of the Division of Fire, because of such individual's race, the matter may be submitted by the parties or any one of them to the Court for resolution.

III. Additional Relief

It is further ORDERED, ADJUDGED, and DECREED as follows:

Affected Class

9. This action is properly maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Members of the class are all minority persons who have applied since January 1, 1968, or who might hereafter apply for the position of fire recruit in the Division of Fire and all minority firemen currently employed by the Division of Fire who have sought since January 1, 1968, or might hereafter seek promotion within the Division of Fire.

Recruitment

10. Defendants shall adopt and proceed to implement as promptly as possible the measures set forth in the recruitment section of its "City of Cincinnati Affirmative Action Plan" adopted on June 20, 1973. The purpose of said program will be to significantly increase the number of minority applicants for employment by the Division of Fire, Department of Safety of the City of Cincinnati, Ohio, in order to attain the employment objectives set forth herein.

11. Defendants' affirmative action recruiting program to increase the number of minority applicants for the position of fire recruit shall include but not be limited to the following:

a. Defendants will undertake to disseminate to the largest possible number of prospective minority applicants the Defendants' goals of increasing minority employment at all levels of the Division of Fire. This will include the terms of this Decree and the Division of Fire's policy of non-discrimination.

b. Defendants will establish information and application centers in predominantly minority neighborhoods during recruiting periods.

c. Defendants will appoint a special recruiting officer, with pay and rank commensurate with his responsibilities, from among minority persons currently employed in the Division of Fire. The special recruiting officer will report directly to the Chief or an Assistant Chief designated by the Chief. The special recruiting officer shall, subject to the authority of the Chief or designated Assistant Chief, be in charge of recruiting efforts in the minority community.

d. Defendants will intensify newspaper and radio advertising in order to recruit minority persons, and Defendants will continue to utilize a mobile van staffed with minority members of the Division of Fire for the purposes of recruiting, publicizing examinations, and answering questions from potential applicants in minority neighborhoods.

e. It is agreed by all parties that recruitment activities shall not interfere with the Division of Fire's primary duties of preventing and extinguishing fires.

Minimum Qualifications for
Hiring Fire Recruits

12. In the appointment of fire recruits and in seeking to achieve the goals established herein in accordance with Paragraphs 21 through 26, all applicants for employment as fire recruits with the Division of Fire shall be considered to be qualified if they meet the minimum specifications set out below, perform satisfactorily on written and oral examinations, which are valid or non-discriminatory as set forth in Paragraphs 16 and 17, below, and if they receive satisfactory ratings under the additional elements of the selection process identified in Paragraphs 18, 19, and 20, below.

13. The following shall constitute the minimum qualifications for applicants:

a. Age 18 to 30 at the time of appointment, except that minority persons who have previously taken the examination for fire recruit since January 1, 1968, and who were not appointed, and all minority applicants who hereafter take the examination for fire recruit for a period of three (3) years after entry of this Decree, will be eligible for appointment if they have not yet attained the age of 35 in order to permit minority persons over the age of 30 who may have been wrongfully discriminated against in the past to qualify as fire recruits.

b. Possession of a valid Ohio Drivers License at the time of appointment.

c. United States citizenship, Ohio residence and Hamilton County residence at the time of appointment.

d. Passage of a written examination as permitted by paragraphs 16 and 17, below, and passage of an oral examination as permitted by paragraph 18.

e. Passage of the physical examination, visual acuity examination, and agility examination.

f. Satisfactory rating on a background investigation in accordance with Paragraph 20, below.

g. Suitable educational background necessary for satisfactory job performance. A high school diploma or equivalent shall meet this requirement, provided applicants who lack a diploma will not be disqualified if they can present evidence of suitable educational skills acquired in other ways. Defendants shall not require any candidate to possess any qualifications which the applicant could obtain through training at the Fire College during his probationary period.

14. Defendants shall not ask for arrest records on the application for the position of fire recruit or in any background investigation of potential fire recruits and shall not consider arrests as a criterion in the selection of fire recruits. Felony and misdemeanor convictions shall not be considered as criteria of employment unless Defendants can demonstrate that the conviction is related to job performance. Names of applicants rejected for employment on the basis of criminal convictions shall be furnished in writing to Plaintiffs.

Testing Procedures

15. In determining the availability of qualified applicants for the position of fire recruit, Defendants may

administer a written test or tests only as permitted by Paragraphs 16 and 17, below, and may not rely upon any other written tests in considering applicants for fire recruit.

16. Defendants shall not use a written test for the selection of applicants for employment by the Division of Fire unless such test has no disproportionate adverse impact upon minority persons or has been validated in accordance with the Equal Employment Opportunity Commission's current "Guidelines on Employee Selection Procedures," 29 C.F.R. §1607.1 *et seq.* If Defendants desire to use a written test which they believe has no disproportionate adverse impact on minority persons, Defendants shall present to Plaintiffs prior to the administration of said test whatever evidence is available showing the absence of said adverse impact for the test in question. If the parties are unable to agree, the question of whether such test is without disproportionate adverse impact may be submitted to the Court for resolution. Tests which have a disproportionate adverse impact or an unknown impact on minority persons may be administered to applicants for the position of fire recruit only for the purpose of determining the validity of such tests as selection devices; they may not be used as selection devices.

17. Until Defendants develop or use a written test validated in accordance with Paragraph 16, above, Defendants may continue to utilize the written examination administered on April 21, 1973, in order to achieve the work force composition set out in Paragraph 22, below. The score received by applicants on this written examination shall be combined with the score received on the oral examination in determining the selection of applicants.

Other Selection Procedures

18. Subject to provisions of this paragraph and Paragraph 17, Defendants may continue to utilize the oral examination administered in April, 1973 in the selection of fire recruits. If the oral examination is conducted by a single interviewer, the interviewer of minority applicants shall also be a minority person. If the oral examination is conducted by a panel of interviewers, at least one-third of the panel shall be composed of minority persons. In no case will a minority group applicant be interviewed solely by white persons.

19. Subject to the provisions of this paragraph, Defendants may continue to utilize the current physical examination, agility examination, and visual acuity examination. If the test or tests utilized by Defendants have a disproportionately adverse impact on minority applicants, Defendants shall review such tests to determine whether the items which comprise them are reasonably related to successful job performance and whether items could be substituted on such tests which would be equally predictive of successful job performance while having less adverse impact on minority candidates. Plaintiffs may apply to the Court for determination as to whether continued use of the test or tests constitutes unlawful discrimination.

20. Subject to the provisions of this paragraph, Defendants may continue to utilize background investigations. Defendants shall review the form of the background investigations to determine whether the items which comprise it are reasonably related to successful job performance and whether said items have an adverse

impact on minority applicants. If the background investigation currently utilized has a disproportionately adverse impact on minority group applicants, the Plaintiffs may apply to the Court for determination as to whether continued use of the background investigation constitutes unlawful discrimination. In the absence of such a determination, the Defendants may continue to use background investigations insofar as no information concerning arrest records is solicited or recorded by the investigator, information concerning criminal convictions is evaluated in compliance with Paragraph 14, above, and the background of minority applicants is investigated and said applicants are interviewed by at least one person of the same race as the applicant.

Hiring

21. Defendants shall not appoint fire recruits from any existing certification list or ranking of available applicants nor engage in any other practice or policy which has the purpose or effect of discriminating against any minority applicant, potential applicant, or minority employee or perpetuating the effects of any past discrimination based on race; except that Defendants may appoint, subject to the provisions of Paragraph 26, within sixty (60) days after the date of entry of this Decree, up to twenty-five (25) fire recruits, at least twenty-five percent (25%) of whom are minority persons. Prior to appointment of this fire recruit class, Defendants shall offer participants in the Model Cities Fire Cadet Program who did not take the April, 1973 Civil Service examinations the opportunity to be tested by a selection procedure comparable to that used in April, 1973, for the position of

fire recruit. Results of said test shall be merged with the existing certification list derived from the April, 1973 Civil Service examinations, and Defendants shall appoint the fire recruit class referred to in this paragraph from that list.

22. Subject to the availability of qualified applicants, Defendants shall adopt and seek to achieve a goal of hiring sufficient numbers of qualified minority persons to achieve a work force composition which will not support any inference of racial discrimination in hiring. Such goal shall be deemed to have been achieved when at least eighteen (18) percent of the Division of Fire personnel of the City of Cincinnati are minority persons. In order to reach this goal, Defendants shall adopt and seek to achieve a goal of hiring sufficient minority persons so that the personnel in the Division of Fire will be:

4.2%	Minority	by	December 31, 1974
6%	Minority	by	December 31, 1975
8%	Minority	by	December 31, 1976
10.5%	Minority	by	December 31, 1977
13%	Minority	by	December 31, 1978
15.5%	Minority	by	December 31, 1979
18%	Minority	by	December 31, 1980

23. Defendants shall be deemed to have sought to achieve each stage of the work force composition goals when and as the above percentages of Fire Division personnel are minority persons either on or within one month before or after the above dates; provided, however, that Defendants shall be deemed to have sought to achieve each stage of the work composition goals in good

faith if at least forty (40) percent of the total fire recruit class for any given year consists of minority persons.

24. Should Defendants fail to achieve the goal set out for any given year, Defendants shall file a report within thirty (30) days to the Court, with service upon all parties, setting forth all facts relied upon to explain the failure to achieve such goal. Persons not completing the probationary period as fire recruit and other persons leaving the Division of Fire at any time shall, as of the date of their failure to complete probation or their departure, no longer be included; provided that such failures or departures shall be considered in determining the availability of qualified applicants.

25. In no event shall the Division of Fire be required to hire a person as a fire recruit who is not qualified. Scores on selection procedures which have not been validated in accordance with the EEOC guidelines or scores on validated standards which are not sufficiently different as to predict a significant difference in job performance shall not be used in determining the qualifications of applicants. A valid ranking of all applicants for the position of fire recruit is not prohibited by this paragraph.

26. Within Fifteen (15) days after the appointment of a fire recruit class pursuant to Paragraph 21, above, Defendants shall offer all identifiable minority persons who have applied for the position of fire recruit since January 1, 1968, but who were not hired, the opportunity to attend Fire College training sessions given the fire recruit class appointed pursuant to Paragraph 21, above. Plaintiffs shall furnish the names and addresses of these

persons, and Defendants shall mail to each, postage prepaid, an invitation to attend Fire College training sessions, describing the program to be implemented as provided by this paragraph. Any costs of this compensatory training will be borne by Defendants, and Defendants shall compensate each minority person so trained at the minimum wage level. Defendants shall provide each minority person who successfully completes such training with a numerical credit sufficient to enable said persons to compete on equal terms with all other prospective candidates on the next ensuing fire recruit examination. The minority persons receiving compensatory training pursuant to this paragraph shall be limited to victims of past alleged discriminatory practices and shall not exceed thirty (30) persons.

Promotions

27. Defendants shall use a system for promoting qualified minority persons within the ranks of the Division of Fire to achieve a goal of a work force composition which negates any inference of an unlawfully discriminatory promotion policy based on race.

Records

28. Defendants shall maintain, during the period of this Decree, the records listed below:

a. All applications for the position of fire recruit, including identification by race on each application.

b. All records which reflect tests results, whether written or practical, for both initial

appointment and promotion into positions with the Division of Fire, and all ratings sheets used in connection with selection for such initial appointment and promotion.

c. All records which reflect the results of any other selection procedures used in the hiring or promotion of persons for positions in the Division of Fire, such as background investigations.

d. All written communications between Defendants and applicants for both initial appointment and promotion in the Division of Fire.

e. All eligibility lists utilized for both initial appointment and promotion.

In the event of any dispute over any of the items included in this paragraph, the dispute may be resolved by the Court.

29. Within thirty (30) days of entry of this Decree, Defendants shall submit to Plaintiffs an alphabetical list of its then current Division of Fire personnel indicating for each person his name, address, race, place of assignment, detail or unit, date of appointment, and rank. Every six (6) months thereafter, for the period of this Decree, Defendants shall submit both an updated version of the above list and a report indicating by race the number of personnel at each level in the Division of Fire.

30. Defendants shall not discriminate or retaliate in any manner against any employee or applicant for employment who has furnished information or participated in any respect in the investigation of Defendants' employment practices in connection with this action, it being understood that the foregoing does not constitute

any admission or finding that Defendants have ever engaged in such practices.

Individual Relief

31. Within thirty (30) days of the date of entry of this Decree, Defendants shall offer Plaintiff Ralph Nichols a position as fire recruit with the Division of Fire, provided he passes the physical examination. For purposes of appropriate pay scale, Plaintiff Nichols' seniority date shall be October 26, 1969.

Damages

32. The claims of Plaintiffs for damages are hereby dismissed with prejudice.

Costs

33. The parties reserve the right to move for an award of costs. The parties reserve the right to oppose this request. The parties agree that any dispute of any award of costs will not impinge on the spirit or effectiveness of this Decree, nor on their compliance with it.

Continuing Jurisdiction of the Court

34. The Court will retain continuing jurisdiction of this action for such further relief or other orders as may be appropriate pending a showing of compliance with the terms of this Decree. Upon a showing of good cause, and upon due notice to all parties, or upon agreement of the parties, any provision of this Decree may be amended or

modified by an order of this Court or any Court of competent jurisdiction. At any time after the objectives of this Decree have been achieved, the Defendants may move this Court, on due notice, for dissolution of the Decree.

Entered at Cincinnati, Ohio, this 7th day of May, 1974.

/s/ David S. Porter
UNITED STATES
DISTRICT JUDGE

APPROVED AS TO FORM
AND CONTENT:

WILLIAM J. BROWN
Attorney General of Ohio

/s/ Diane R. Liff
DIANE R. LIFF – TRIAL
ATTORNEY
Assistant Attorney
General
Deputy Chief, Civil
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/s/ Andrew J. Ruzicho/
DAL
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Chief, Civil Rights
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/s/ Thomas A. Luebbers
THOMAS A.
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ATTORNEY FOR
PLAINTIFFS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TILFORD YOUNGBLOOD, et al. Plaintiffs -vs- JOHN DALZELL, et al. Defendants	:	CIVIL ACTION NO. 8774 ENTRY MODIFYING CONSENT DECREE J. Porter (Filed Apr. 9, 1981)

For good cause shown and by agreement of counsel for all parties, the Consent Decree entered in this cause on May 7, 1974, is hereby amended in the following respect, and in these respects only; all other terms and conditions of said Consent Decree to remain in full force and effect.

Paragraph No. 22 shall be amended to read as follows:

> "22. Subject to the availability of qualified applicants, Defendants shall adopt and seek to achieve a goal of hiring sufficient numbers of qualified minority persons to achieve a work force composition which will not support any inference of racial discrimination in hiring. Such goal shall be deemed to have been achieved when at least eighteen (18) percent of the Division of Fire Personnel of the City of Cincinnati are minority persons. In order to reach this goal, Defendants shall adopt and seek to achieve a goal of hiring sufficient minority persons so that the personnel in the Division of Fire will be 11%

minority by December 31, 1981 and will increase by at lest two percent each year thereafter until the minority percentage is 18% of the sworn force."

Entered at Cincinnati, Ohio this 9th day of April, 1981.

/s/ David S. Porter
United States District Judge

Approved as to form and content:

William J. Brown
Attorney General of Ohio

By: /s/ Donald W. Conley
Donald W. Conley
Assistant Attorney General
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/s/ Robert Newman
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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY JANSEN, et al., Plaintiffs,	**CASE NO.**
vs.	RESPONSE TO **FIRST SET OF REQUESTS FOR ADMISSIONS FROM PLAINTIFFS TO DEFENDANTS**
THE CITY OF CINCINNATI, et al., Defendants.	

Pursuant to Ohio Civil Rule 34, plaintiffs request that defendants produce, within twenty-eight (28) days of the service hereof, the following described documents for inspection and copying at the office of the requesting party's trial attorney, William S. Wyler, Schwartz, Manes & Ruby, 2900 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202-3090, or at such other place agreed upon between counsel. In lieu of such production, copies of the documents requested may be sent to the above address within the same twenty-eight (28) day period.

DOCUMENTS AND INSTRUCTIONS

A. The words "document" or "documents" are used in the comprehensive sense, and shall include, without limitation, any written, printed, recorded or graphic matter, photographic matter or sound reproduction, however produced or reproduced, of any type or nature whatsoever, including drafts and copies not identical to the original, or including, without limitation, any and all written correspondence, letters, telegrams, agreements,

* * *

14. The Consent Decree did not set forth a mandatory hiring quota of 40% minorities to 60% non-minorities.

RESPONSE:

Admitted. See paragraphs 22 and 23 of the Consent Decree wherein the 40% minority hiring ratio is described as evidence of a good faith effort to achieve goals for minority hiring in the Fire Division.

15. Ohio Revised Code § 124.01 et seq. does not authorize the dividing of open eligible lists for the fire division by race.

RESPONSE:

Admitted. Ohio Revised Code Section 124.01, et seq. does not address dividing of open eligible lists for the Fire Division by race; however, the Consent Decree does authorize that division.

16. The Charter of the City of Cincinnati does not authorize the dividing of open eligible lists for the fire division by race.

RESPONSE:

Admitted. The Charter of the City of Cincinnati does not address dividing open eligible lists for the Fire Division by race; however, the Consent Decree does authorize that division.

17. The Consent Decree does not require defendants to divide eligible hiring lists, established under the Civil Service System, based upon race.

RESPONSE:

Admitted. However, the Consent Decree does authorize that division.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY JANSEN, et al., Plaintiffs,	**CASE NO. C-1-89-079**
vs.	RESPONSE TO
THE CITY OF CINCINNATI, et al., Defendants.	**FIRST SET OF INTERROGATORIES TO DEFENDANTS**

Pursuant to Rules 33 and 34 of the Rules of Civil Procedure, the Plaintiffs hereby submit the following interrogatories and request for the production of documents to the Defendants. These questions must be answered by the Defendants, under oath, within thirty (30) days after service.

INSTRUCTIONS FOR INTERROGATORIES

1. Each interrogatory shall be answered separately and fully, in writing under oath by the Defendants and the Defendants shall seasonably supplement and correct the responses pursuant to Rule 26(E) as Defendant obtain additional information between the time the answers are served and the time of trial.

2. A separate answer should be furnished for each interrogatory or portion of an interrogatory although, where the contest permits, an interrogatory can be answered by reference to a response furnished for another interrogatory, but this should not be interpreted

to narrow or limit the normal interpretation placed upon each individual interrogatory.

* * *

12. Please set forth, specifically, each and every section of the Consent Decree which requires a quota for hiring 40% minorities to 60% non-minorities.

RESPONSE:

The Consent Decree does not require a quota for hiring 40% minorities to 60% nonminorities. See paragraphs 22 and 23 of the Consent Decree wherein the 40% minority hiring ratio is described as evidence of a good faith effort to achieve goals for minority hiring in the Fire Division.

13. State the date on which the overall staffing level of the city fire division consisted of 18% or more minorities.

RESPONSE:

The approximate date on which the overall staffing level of the City Fire Division consisted of 18% or more minorities was December 31, 1986.

14. Please state the percentage of minorities making up the city fire division on the date that the recruit class or classes from list 87-80 was sworn in.

RESPONSE:

The recruit class from list 87-80 was hired on August 7, 1988. The percentage of minorities making up the City Fire Division was 18.6% prior to hiring the recruit class from list 87-80.

15. Please set forth, specifically, each portion of the Consent Decree which requires defendants to set aside and not follow Ohio Civil Service law.

RESPONSE:

The Consent Decree in total is a court order authorizing defendants to follow its terms in lieu of Ohio Civil Service law.

16. Absent a court order, is the City of Cincinnati generally required to follow the law set forth in the Ohio Revised Code, as the basis for operating its own Civil Service system.

RESPONSE:

Yes.

17. Please state, specifically, where in the Consent Decree the Cincinnati fire division or more generally, the City of Cincinnati, was found to have engaged in a concerted effort or pattern of racial discrimination.

RESPONSE:

The Consent Decree does not state "the Cincinnati Fire Division or . . . the City of Cincinnati was found to have engaged in a concerted effort or pattern of racial discrimination." See paragraph 5 of the Consent Decree.

18. In the Consent Decree, does the City of Cincinnati deny that it has unfairly discriminated on the basis of race?

RESPONSE:

Yes. See paragraph 5 of the Consent Decree.

19. Who determined that the fire recruit class would be 60% majority members and 40% minority members.

RESPONSE:

Those persons signing the Consent Decree.

20. Will you, without need of a motion to produce, please provide all data, memoranda, and documentation within City Hall, addressing the issue of, or having anything to do with, the recruit class sworn in from list 87-80, including memoranda from or to the fire division or between people in the executive offices or the personnel department, particularly with regard to the racial makeup of such class, prior to its swearing in.

RESPONSE:

To date, no such documents have been found. Investigation is continuing to determine information responsive to this Interrogatory.

/s/ William S. Wyler
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(513) 579-1414
Attorney for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (CINCINNATI)**

TIMOTHY JANSEN, et. al., Plaintiffs,	**CASE NO. C-1-90-134 (Rubin, J.) (Magistrate Sherman)**
vs.	RESPONSE TO
THE CITY OF CINCINNATI, et. al., Defendants.	**THIRD SET OF INTERROGATORIES TO DEFENDANTS FROM PLAINTIFFS**

* * *

INTERROGATORIES

1. With regard to the examination processes which created the promotional eligible lists upon which the consolidated plaintiffs' names were placed in the within litigation, did the City of Cincinnati use a validated examination process in accordance with the Equal Employment Opportunity Commission's current "guidelines on employee selection procedures".

Yes.

2. If the answer set forth above is in the affirmative, please state as specifically as possible what process defendant city followed to assure that said examination complied with the Equal Employment Opportunity Commission (EEOC) current guidelines on employee selection procedures.

A job analysis was conducted by the test company to determine the necessary knowledges,

skills and abilities necessary to perform the job of Firefighter. The test was constructed to tap those minimum qualifications. Additionally, a transportability study was conducted to insure that the test was also valid for the Cincinnati Fire Division.

3. Since the Consent Decree in *Youngblood v. Dalzel* (sic) was originally entered into and filed on May 7, 1974, please set forth each and every hiring examination for fire recruits WHICH DID NOT use the then current Equal Employment Opportunity Commission guidelines on employee selection procedures.

None.

4. For any such examinations, set forth in the answer immediately above, please state why such procedures and guidelines were not followed and what action was undertaken to assure that the examinations would be race neutral.

N/A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY JANSEN, ET AL, Plaintiffs,	:	
vs.	:	Civil Action
CITY OF CINCINNATI, ET AL, Defendants.	:	C-1-89-079

The deposition of CAROL CALLAHAN, Witness herein, taken as on Cross Examination by the Plaintiff, pursuant to the Federal Rules of Civil Procedure, and notice issued to take deposition at the offices of the City Solicitor, Room 214 City Hall, Cincinnati, Ohio 45202 on Monday, December 17, 1990, at 2:00 p.m., before Vera L. Draper, a court reporter and Notary Public.

* * *

[p. 5] Q. I want to expand a bit on your answers to the intervenors, and we don't have to - Well, we can mark it. Let's mark this as Callahan Deposition Exhibit No. 1.

(Callahan Exhibit No. 1 was marked for identification.)

MR. WYLER: Were you referring to the ones August 10th, 1990?

MR. SCHRIDER: Yes, the answers.

Q. Let's take a look at those, Miss Callahan. Let's go to your answer to No. 3 which is on pages 5 and 6. Now do you see at the bottom where it starts 3-B and you are being asked to state whether the examination and examination procedures are culturally biased in the sense that black persons are likely to do less well than white persons because of their different cultural and educational background. You see that? And the answer was, "No study has been conducted."

Let me stop there for a second. In answering these interrogatories, I take it that your answer went to both the 1988 and the 1989 exam; is that correct?

A. Right.

MR. WYLER: At this point I would like to impose an objection to this line

* * *

[p. 27] goal.

Q. When you say you try to meet that goal, you basically set aside the rankings on the Civil Service exam to do it; correct?

A. Correct.

Q. Where, do you know of any language in the consent decree that authorizes the City to do that?

MR. VOLLMAN: Just so it is timely, object, calls for a legal conclusion. You may answer.

A. No.

Q. In fact, the Ohio Revised Code mandates that individuals shall be placed on an eligible list in the order of their relative excellence, is that correct?

A. Correct.

Q. And orders that they be hired in that order pending the Rule 3?

A. Rule 3?

Q. In all of my discussions about hiring, we are assuming Rule 3; in other words, we are talking about certification to the fire chief for hiring under the Rule of 3?

A. Correct.

* * *

[p. 31] Q. I am talking on average.

A. On average, one out of every 10 make it all the way through from the written test.

Q. Now do you happen to know whether those averages hold true for the three lists we are involved in here?

A. Pretty much so.

Q. Without being specific?

A. Yes.

Q. That's about right?

A. Uh-huh.

Q. Okay. Can you tell me when this decree will end? When in your opinion as one of the people the City

relies on, when do you see that it would have been met in its terms?

MR. VOLLMAN: Objection as to her opinion. She is testifying as a fact witness, I don't know what her opinion has to do with it.

A. I don't know.

Q. You don't know?

A. No.

Q. Do you know of anyone in the City administration who does know?

A. It is my understanding that for it

* * *

[p. 37] you might be the best at the physical ability or more proficient at other aspects of the job.

Q. But you stated earlier, in your earlier testimony that you thought that there would be a difference between those ranked near the top of the list and those, say, a hundred down on the list?

A. There is a difference in proficiency on the written test. If I got 95 and you got 96 that wouldn't be indicative that you were smarter than I at this part of the test.

Q. If you got 95 and I got 83?

A. I would show more proficiency on this component of the test, yes, I would say that.

Q. Is it not correct, with the exception of the City's interpretation of the consent decree, the Ohio Revised

Code would still require the City to hire off a single list by relative excellence based on the written exam; is that correct?

MR. VOLLMAN: Objection. What the code requires.

A. No, it wouldn't.

Q. It wouldn't?

A. We could have an oral component to that, it would not be just a written test. Or we could choose to give points for the physical ability test or

* * *

AMENDMENT 14

SECTION 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives-Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. Public debt not to be questioned – Debts of the Confederacy and claims not to be paid

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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42 U.S.C. § 1983 – CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 124.26 Eligible Lists; Veteran's Preference; Existing Employees Who Pass Examination

(A) Except as provided in divisions (B) and (C) of this section, from the returns of the examinations the director of administrative services shall prepare an eligible list of the persons whose general average standing upon examinations for such grade or class is not less than the minimum fixed by the rules of the director, and who are otherwise eligible; and such persons shall take rank upon the eligible list as candidates in the order of their relative excellence as determined by the examination without reference to priority of the time of examination. In the event two or more applicants receive the same mark in an open competitive examination, priority in the time of filing the application with the director shall determine the order in which their names shall be placed on the eligible list; provided, that applicants eligible for veteran's preference under section 124.23 of the Revised Code shall receive priority in rank on the eligible list over nonveterans on the list with a rating equal to that of the veteran. Ties among veterans shall be decided by priority of filing the application. In the event of two or more applicants receiving the same mark on a promotional examination, seniority shall determine the order in which their names shall be placed on the eligible list. The term of eligibility of each list shall be fixed by the director at not less than one nor more than two years. When an eligible list is reduced to three names or less, a new list may be prepared. The director may consolidate two or more eligible lists of the same kind by the rearranging of eligibles named therein, according to their grades.

§ 124.27 Appointments; Certified And Provisional; Probationary Period

The head of a department, office, or institution, in which a position in the classified service is the [sic] be filled, shall notify the director of administrative services of the fact, and the director shall, except as otherwise provided in this section and sections 124.30 and 124.31 of the Revised Code, certify to the appointing authority the names and addressees of the three candidates standing highest on the eligible list for the class or grade to which the position belongs; provided, that the director may certify less than three names if three names are not available. When less than three names are certified to an appointing authority, appointment from that list shall not be mandatory. When a position in the classified service in the department of mental health or the department of mental retardation and developmental disabilities is to be filled, the director of administrative services shall make such certification to the appointing authority within seven working days of the date the eligible list is requested.

The appointing authority shall notify the director of such position to be filled, and he shall fill such position by appointment of one of the three person certified to him. If more than one position is to be filled, the director of administrative services may certify a group of names for the eligible list and the appointing authority shall appoint in the following manner: Beginning at the top of the list, each time a selection is made it must be from one of the first three candidates remaining on the list who is willing to accept consideration for the position. If an eligible list becomes exhausted, and until a new list can be created, or when no eligible list for such position

exists, names may be certified from eligible lists most appropriate for the group or class in which the position to be filled is classified. A person certified from an eligible list more than three times to the same appointing authority for the same or similar positions, may be omitted from future certification to such appointing authority, provided that certification for a temporary appointment shall not be counted as one of such certifications. Every soldier, sailor, marine, coast guardsman, member of the auxiliary corps as established by congress, member of the army nurse corps, or navy nurse corps, or red cross nurse who has served in the army, navy, or hospital service of the United States, and such other military service as is designated by congress in the war with Spain, including the Philippines insurrection and the Chinese relief expedition, or from April 21, 1898, to July 4, 1902, World War I, World War II, or during the period beginning May 1, 1949, and lasting so long as the armed forces of the United States are engaged in armed conflict or occupation duty, or the selective service or similar conscriptive acts are in effect in the United States, whichever is the later date, who has been honorably discharged or separated under honorable conditions therefrom, and is a resident of Ohio, and whose name is on the eligible list for a position, shall be entitled to preference in original appointments to any such competitive position in the civil service of the state and the civil divisions thereof, over all persons eligible for such appointments and standing on the list therefor, with a rating equal to that of each such person. Appointments to all positions in the classified service, that are not filled by promotion, transfer, or reduction, as provided in sections 124.01 to 124.64 of the Revised Code, and the rules of the director

prescribed under such sections, shall be made only from those persons whose names are certified to the appointing authority, and no employment, except as provided in such sections, shall be otherwise given in the classified service of this state or any political subdivision thereof.

All original and promotional appointments, including provisional appointments made pursuant to section 124.30 of the Revised Code, shall be for a probationary period, not less than sixty days nor more than one year, to be fixed by the rules of the director, except as provided in section 124.231 of the Revised Code, or except original appointments to a police department as a policeman or policewoman, or to a fire department as a fire fighter which shall be for a probationary period of one year, and no appointment or promotion is final until the appointee has satisfactorily served his probationary period. Service as a provisional employee in the same or similar class shall be included in the probationary period. If the service of the probationary employee is unsatisfactory, he may be removed or reduced at any time during his probationary period after completion of sixty days or one-half of his probationary period, whichever is greater. If the appointing authority's decision is to remove the appointee, his communication to the director shall indicate the reason for such decision. Dismissal or reduction may be made under provisions of section 124.34 of the Revised Code during the first sixty days or first half of the probationary period, whichever is greater. Any person appointed to a position in the classified service under sections 124.01 to 124.64 of the Revised Code, except temporary and exceptional appointments, shall be or become forthwith a resident of the state.

124.90 Waiver of laws to avoid federally prohibited discrimination

(A) Any municipal corporation may, by a two-thirds vote of its legislative authority, waive, suspend, or alter any of the provisions of this chapter as they apply to that municipal corporation if such waiver, suspension, or alteration is necessary for the municipal corporation to comply with any federal law or any rules adopted pursuant to federal law concerning discrimination in employment.

(B) Any municipal corporation that has adopted the provisions of this chapter as part of its charter may, by a two-thirds vote of its legislative authority, waive, suspend, or alter any of the provisions of this chapter so adopted if such waiver, suspension, or alteration is necessary for the municipal corporation to comply with any federal law or any rules adopted pursuant to federal law concerning discrimination in employment.

(C) A municipal corporation may not under this section make any waiver, suspension, or alteration of provisions of this chapter that relate to matters of promotions within the municipal civil service.

Supreme Court, U.S.
FILED
APR 22 1993
OFFICE OF THE CLERK

No. 92-1555

In The

Supreme Court of the United States

October Term, 1992

TIMOTHY JANSEN, DANIEL K. GOENS, ROBERT H. PRASSE, EVAN WOOD, and MARC E. MONAHAN;

and

WILLIAM NEAL, BRIAN CLEMENS, FRANK GORRASI, GREGORY HISSETT, and PHILIP S. RAMSTETTER;

and

DANIEL R. CORRY, NOAH H. GIBBS IV, TIMOTHY B. BURWICK, LAWRENCE D. CAPPEL, ROBERT HART, JEFFREY H. SWEET, MARK E. KREIMER, NICHOLAS SCHIBI, and TIMOTHY A. CUNNINGHAM,

Petitioners,

vs.

CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION, WILLIAM MILLER, and NORMAN WELLS;

and

TILFORD YOUNGBLOOD, RALPH NICHOLS,

and

THE PLAINTIFF CLASS CONSISTING OF BLACK APPLICANTS FOR AND BLACK EMPLOYEES OF THE DIVISION OF FIRE OF THE CITY OF CINCINNATI,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can a valid consent decree entered into by a municipality to remedy prior racial discrimination be modified by a district court before the court makes the relevant findings of fact necessary to modify the decree?

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STATEMENT OF THE CASE

The Petitioners are white males who sought and were denied positions as firefighters in the Fire Division of the City of Cincinnati (hereinafter, "Fire Division").[1] The Petitioners challenge as unconstitutional the City's use of a dual list system for hiring Fire Division recruits. The City of Cincinnati's (hereinafter, "City" or "City-Respondent") hiring practices stem directly from a Consent Decree entered into by the City.

In May 1974, the City-Respondents, the Legal Aid Society and the Ohio Attorney General entered into a Consent Decree that was approved by the United States District Court, Southern District of Ohio (Petitioners' App. 15). The stated purpose of the Consent Decree was to integrate the Fire Division of the City of Cincinnati (Petitioners' App. 15). Previous to the entering of the Consent Decree, there had been a "manifest imbalance" with regard to the racial composition within the Fire Division; specifically, only one half of one percent of the Fire Division personnel had been African-Americans. (Petitioners' App. 21-22, citing *Youngblood v. Dalzell*, 804 F.2d 360, 364 (6th Cir. 1986), *cert. denied, Cincinnati Firefighters Union, Local Union No. 48 v. Youngblood*, 480 U.S. 935, 107 S.Ct. 1576, 94 L.Ed.2d 767 (1987)).[2]

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[1] Some of the Petitioners have subsequently earned positions in the Fire Division. The procedural posture with regard to all the Petitioners is accurately set forth in the first paragraph of the Petitioners' brief. The Respondents take issue with the remainder of the Petitioners' Statement of the Case.

[2] The decision of the Sixth Circuit from where this petition originates is found at the Petitioners' Appendix, at pages 13-30,

There are certain parts of the Consent Decree relevant in this appeal. Paragraph 22 of the Consent Decree provides that the City-Respondent " . . . shall adopt and seek to achieve a goal of hiring qualified minority persons. . . . Such goal shall be deemed to have been achieved when at least eighteen (18) percent of the Division of Fire Personnel of the City of Cincinnati are minority persons" (Petitioners' App. 48-49). Paragraph 23 provides that the City-Respondent:

> shall be deemed to have sought to achieve each stage of the work force composition goals when and as the above percentages of the Fire Division personnel are minority persons either on or within one month before or after the above dates; provided, however, that the Defendants shall be deemed to have sought to achieve such stage of the work composition goals in good faith if at least forty (40) percent of the total recruit class for any given year consists of minority persons.

(Petitioners' App. 41-42). Paragraph 34 of the Consent Decree governs the continuing jurisdiction of the District Court and the duration of the Consent Decree (Petitioners' App. 45-46). The last sentence of the Consent Decree states that "[a]t any time after the objectives of the decree have been achieved, the Defendants [City] may move this Court, on due notice, for dissolution of the Decree" (Petitioners' App. 46).[3]

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and is hereinafter cited to that source. The decision is also bound at 977 F.2d 238.

[3] In addition to the hiring provisions, the Consent Decree contains provisions regarding advertisement of job openings to

The Fire Division assesses the qualifications of the applicants through a selection process which consists of a written examination, a physical ability test, a medical examination, a background investigation, and a psychological evaluation (Petitioners' App. 17). A score of seventy (70) or above on the written examination is passing, while the other components are scored on a pass/fail basis (Petitioners' App. 17). The City-Respondent has implemented the hiring goals pursuant to the Consent Decree by using a dual-list scheme (Petitioners' App. 16). The Fire Recruit Majority List consisted of non-minority candidates who successfully completed all phases of the Fire Recruit selection process, while the Fire Recruit Minority List consisted of minority candidates who successfully completed all phases of the Fire Recruit selection process (Petitioners' App. 16). The City-Respondent has taken sixty percent of its Fire Recruits from the Majority List and forty percent from the Minority List pursuant to paragraph 23 of the Consent Decree (Petitioners' App. 16).

Those applicants who passed all five phases of the selection process were placed on an eligible list and certified to the Fire Chief for consideration for hiring in the Fire Division (Petitioners' App. 17). Under Ohio Civil Service Rules, the Fire Chief has discretion to choose from the top three people on the eligible list. Ohio Revised Code § 124.27 (Petitioners' App. 68-70). Accordingly, the "Rule of Three" does not guarantee employment to those ranking highest on a given eligibility list, but merely

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reach minority applicants, recruitment, promotions and record keeping (Petitioners' App. 31-46).

guarantees hiring consideration (Petitioners' App. 17). The Petitioners argue that because they scored higher on the written examination than some of the minority candidates who were hired as Fire Recruits, they should have been hired.

Had the dual-list system not been implemented in the years 1988-1990, however, significant under-representation in minorities would have resulted, as less than ten (10) out of one hundred and fifteen (115) applicants who would have been elevated pursuant to the Ohio Civil Service Rules would have been minorities (Petitioners' App. 24).

After the filing of cross motions for summary judgment, the District Court concluded as a matter of law that Paragraph 22 of the Consent Decree should be terminated because the eighteen percent hiring goal had been met (Petitioners' App. 12). The district court explicitly stated that the Consent Decree itself was not invalid; rather, the court concluded that because the eighteen percent goal set forth in paragraph 22 had been attained, the City was prohibited from applying that part of the Consent Decree (Petitioners' App. 9). The District Court did not address the concerns of a class of black applicants for and black employees of the Fire Division who had intervened in the case (Petitioners' App. 29; Petitioners' App. 1-12).[4] The African-American class claimed that the City-Respondent has engaged in racially discriminatory hiring practices in the last few years (Petitioners' App. 18).

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[4] A class of black applicants for and black employees of the Fire Division were permitted to intervene by the Sixth Circuit. *Jansen v. City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990).

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the District Court. The Court of Appeals held that the District Court's "limited" order which dissolved only Paragraph 22 of the Consent Decree failed to read that section in conjunction with the rest of the Consent Decree (Petitioners' App. 26). More importantly, the Court of Appeals held that the District Court failed to adhere to the dictates of this Court's recent decision in *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991), and to prior circuit precedent which set certain procedures for the modification of a consent decree (Petitioners App. 26-28).

ARGUMENT

I. REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petitioners seek review of the court of appeals judgment claiming that "[t]he Sixth Circuit decision is at odds with this Court's prior rulings that a political subdivision's use of racial classifications deprives one of his or her constitutionally protected *property rights* under color of state law" (Brief of Petitioners 8) (emphasis added). Moreover, the Petitioners seek review claiming that "there exists a conflict between the circuits" (Brief of Petitioners 25). Pursuant to Supreme Court 10.1, if the Sixth Circuit's decision had in fact been at odds with this Court's previous cases or if the decision had caused a split among the circuits, these two factors could lend justification for this Court to carefully review whether to

grant the Petition for Writ of Certiorari. In this case, however, both of these factors are absent. Accordingly, because the Petitioners have not established any inconsistent treatment of the issue in this case, this Court should deny the Petitioners' request for the Writ of Certiorari.

1. The Petitioners do not have a constitutionally protected property interest to be hired as governmental employees.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 2717, 33 L.Ed.2d 570, 581 (1972) establish the parameters of an individual's "property" interests in the employment setting.[5] Specifically, this Court held that to have a property interest in a benefit, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. To determine whether such an entitlement is property subject to constitutional protection, state law should be referenced. *Roth*, 408 U.S. at 577.

In this case, it is clear that the Petitioners did not have an entitlement to government employment. The

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[5] Although both cases revolve around due process clause challenges, this Court's analysis of property interests in the employment context applies with equal force to the equal protection clause challenge in the case *sub judice*.

Ohio civil service law which covered the hiring procedure for the Petitioners did not guarantee an entitlement to a job; on the contrary, the "Rule of Three" system "merely guarantees hiring consideration" (Petitioners' App. 17, applying plain language of Ohio Revised Code § 124.27). It is clear that the Petitioners did not have a "property interest" in their mere unilateral expectation of a position with the Fire Division. *E.g., Newark Branch, N.A.A.C.P. v. Town of Harrison*, 940 F.2d 792, 809-10 (3rd Cir. 1991), where the court, faced with an affirmative action plan implemented pursuant to a consent decree, cited *Roth* and *Perry v. Sinderman* and held that prospective employees' ranking on an eligibility list used for the purposes of hiring firefighters was not a property interest protected under the due process and equal protection clauses of the Federal Constitution.

2. There is not a split among the circuits on the issue presented in this case.

The Petitioners' second justification for seeking review is that there is a split among the circuits. The cases the Petitioners cite for support of their position, however, are not in conflict with the Sixth Circuit's decision below (Brief of Petitioners 24-25). The Petitioners cite *Commonwealth of Pennsylvania v. Flaherty*, 983 F.2d 1267 (3rd Cir. 1993) and *Ledoux v. District of Columbia*, 820 F.2d 1293 (D.C. Cir. 1987) for support of their claim that there is a circuit split.

Flaherty did not involve a consent decree, but rather involved the dissolution of a preliminary injunction "which prescribed a quota hiring system whereby for

every white male hired by the City, the City was enjoined to hire one qualifying African-American. . . . " 983 F.2d at 1267. Moreover, in 1975, when the district court judge had entered the preliminary injunction, no finding of discrimination was made. *Flaherty*, 983 F.2d at 1270. Rather, the preliminary injunction was entered into "entirely upon evidence that African-Americans as a whole scored lower on the examination than white Americans, and were thus disparately impacted by the exam." *Flaherty*, 983 F.2d at 1270. These two factors clearly distinguish *Flaherty* from the case *sub judice*.

First, in *Flaherty*, the *only* factor that justified the preliminary injunction was the disparate impact of the test. 983 F.2d at 1270 (emphasis added). Subsequent to the entering of the preliminary injunction, the standard for judging disparate impact justifications was heightened by this Court in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), a standard which the Third Circuit applied in *Flaherty* to dissolve the injunction. 983 F.2d at 1273-75. In the case *sub judice*, however, the Consent Decree was entered into not because of a disparate impact in any test, but because of the alarming dearth of minorities in the Cincinnati Fire Division. Although the issue of whether there was discrimination in the hiring of minorities was not tried before the District Court in 1974 because of the negotiated settlement embodied by the Consent Decree, the Sixth Circuit was persuaded by the fact that the number of minority firemen in the Fire Division was *one half of one percent*, a fact which justified the Consent Decree. *Youngblood v. Dalzell*, 568 F.2d 506, 508 (6th Cir. 1978) (emphasis added). In addition, the preliminary injunction in *Flaherty* prescribed a one-for-

one quota, whereas the Consent Decree at issue here set forth hiring *goals*. The distinction between a hiring goal and a quota is important. *See Johnson v. Transportation Agency*, 480 U.S. 616, 639, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987).

Secondly, there is a distinct difference between a preliminary injunction and a consent decree. This distinction is highlighted by this Court's recent decision in *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 757-58, 116 L.Ed.2d 867 (1992), where this Court held that consent decrees are subject to modification under the guidelines of Federal Rule of Civil Procedure 60(b). Case law establishes that the *party seeking to modify* a judgment must establish extraordinary circumstances in order for a court to grant relief under Fed.R.Civ.P. 60(b).[6] *E.g.*, *Ackermann v. United States*, 340 U.S. 193, 202, 71 S.Ct. 209, 95 L.Ed. 207 (1950); *Mallory v. Eyrich*, 922 F.2d 1273, 1281 (6th Cir. 1991). On the other hand, a heavy burden in *Flaherty* was on the *party seeking to uphold* the injunction which mandated the affirmative action policy. 983 F.2d at 1269, 1273. These two different standards, along with the other distinguishing characteristics discussed *supra*, militate against the finding that *Flaherty* and the decision of the court below are in conflict.

The second circuit court decision which the Petitioners claim conflicts with the decision below is a 1987

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[6] This Court recently reaffirmed that a consent decree is essentially treated as a judgment. *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 757 (1992) (citing *Railway Employees v. Wright*, 364 U.S. 642, 650-51, 81 S.Ct. 368, 372-73, 5 L.Ed.2d 309 (1961).

Title VII case from the District of Columbia. *Ledoux v. District of Columbia*, 820 F.2d 1293 (D.C. Cir. 1987), however, wholly fails to support the Petitioners' claim. In fact, the court of appeals was faced with a voluntary affirmative action plan embodied by a consent decree and which dealt with the *promotion* of employees rather than the *hiring* of prospective employees. *Ledoux*, 820 F.2d at 1296-97. The court's discussion, *id.* at 1302-03, and opinions of this Court, *e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282, 106 S.Ct. 1842, 90 L.Ed.2d 260, *reh'g denied*, 478 U.S. 1014, 106 S.Ct. 3320, 92 L.Ed.2d 728 (1986) (plurality opinion) highlight that affirmative action plans involving hiring goals do not impose the same type of intrusive injuries as do other remedial measures such as promotions or layoffs. Along the same lines, the court, citing *Wygant*, 476 U.S. at 274-75; *Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), concluded that " 'gross statistical disparity' " alone could satisfy the constitutional requirement of a remedial purpose as articulated by this Court.[7] This is entirely consistent with the case *sub judice*, because at the time the litigation which led to the Consent Decree was commenced, minorities consisted of only one half of one percent of the Fire Division, surely a "gross statistical disparity". *See Youngblood v. Dalzell*, 568 F.2d 506, 508 (6th Cir. 1978). Finally, the *Ledoux* court upheld the affirmative action at issue in that case, 820 F.2d at 1304-06; therefore,

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[7] This Court specifically stated that "gross statistical disparities . . . alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1978).

the City-Respondent fails to see how the court "condemned" such affirmative action plans nor does the City-Respondent understand how there is a conflict between the circuits (Brief of Petitioners 24). The opinion in *Ledoux*, moreover, in addition to not conflicting with the decision below, has been vacated by an *en banc* court. *Ledoux*, 820 F.2d 1293 (D.C. Cir.), *reh'g granted en banc*, 833 F.2d 368 (1987), *opinion vacated*, 841 F.2d 400 (1988).

No decision of a circuit court has been set forth which is in conflict with the decision of the court of appeals below. In fact, the only appellate court that has decided the issue before this Court has held in accord with the Sixth Circuit. *See Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992), which will be discussed *infra*. What the Petitioners miscomprehend is that the issue in this case is much narrower than the issue the Petitioners suggest is ripe for review by this Court (Brief of Petitioners 12). Once this Court analyzes the narrow issue presented for review, it will become apparent that there are no reasons warranting review of this appeal.[8]

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[8] The Petitioners make reference to *Billish v. City of Chicago*, 969 F.2d 1269 (7th Cir. 1992) (Brief of Petitioner 25). This decision has subsequently been reversed (5-4) *en banc* by the Seventh Circuit. *Billish v. City of Chicago*, ___ F.2d ___, 1993 WL 88375 (7th Cir., March 29, 1993). The decision deals with a dual list scheme for implementing an affirmative action plan. *Billish*, ___ F.2d ___, 1993 WL 88375 (App. 1). Although a cursory reading of the opinion may give the impression that the case is at odds with the decision of the court below, a careful reading militates against this conclusion. First, the decision revolves around promotion practices rather than hiring practices, *Billish*, ___ F.2d ___, 1993 WL 88375 (App. 1), and as was discussed earlier, two different standards apply. Second, there were additional factual

II. QUESTION PRESENTED FOR REVIEW

Can a valid consent decree entered into by a municipality to remedy prior racial discrimination be modified by a district court before the court makes the relevant findings of fact necessary to modify the decree?

Before discussing the narrow issue presented in this appeal, some points need to be briefly addressed in order to respond to some of the Petitioners' arguments. First, it must be kept in mind that the City's hiring policies have been implemented pursuant to a valid consent decree. The United States Court of Appeals for the Sixth Circuit has upheld the validity of the Consent Decree at issue here on numerous occasions. (Petitioners' App. 13-30); *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991); *Youngblood v. Dalzell*, 804 F.2d 360 (6th Cir. 1986), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1576, 94 L.Ed.2d 767 (1987). Moreover, in each of these cases, the Sixth Circuit upheld the "dual list scheme" employed by the City of Cincinnati in the hiring of Fire Recruits (Petitioners' App. 22-23). ("[I]n the several appeals involving the City's Fire Division consent decree that have come before this Court, this

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distinctions between the cases. *Compare Billish*, ___ F.2d ___, 1993 WL 88375 (App. 9), with *Jansen v. City of Cincinnati*, 977 F.2d 238, 243, for example (EEOC's "content validation" guidelines (29 C.F.R. 1607.5) for employment tests were met in the former while they were not met in the later). Finally, and probably most importantly, the Seventh Circuit did not reject the use of the dual list scheme, but rather, the court held that a trial on the merits before the district court was needed. *Billish*, ___ F.2d ___, 1993 WL 88375 (App. 1, 5, 15-16) (remanding to the district court). As will be explained in the next section, the resolution of this case similarly should be decided by the district court on remand after appropriate factual findings are made.

Circuit has validated, *sub silentio*, the City's use of dual lists for hiring purposes").

The Petitioners argue that these previous cases, however, were inconsistent with this Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501, 109 S.Ct. 1010, 98 L.Ed.2d 976 (1989) and *Hazelwood*, 433 U.S. 307-08, claiming that no statistics established that the City had previously discriminated in the hiring of Fire Recruits, claiming that the City never admitted discrimination, and claiming that "there was no judicial finding of discrimination" (Petitioners' App. 13-14). The Petitioners, however, erroneously overlook critical facts and legal principles which cast doubt on each of Petitioners' three arguments. One, when the Consent Decree was entered into, there was a gross statistical disparity which justified the City's implementation of an affirmative action plan. Specifically, in 1973, the year before the Consent Decree was entered into, the City firefighter force was only 0.5% African-American. The Petitioners' argument that "merely reciting that there is a 'manifest imbalance' in the Fire Division is hardly tantamount to a statistical finding of discrimination" (Petitioners' App. 15-16) ignores the facts which surround the entering of the Consent Decree and further miscomprehends the decisions of this Court that sanction remedial actions upon a showing of wide or gross statistical disparities. *Wygant*, 476 U.S. at 274-75; *Hazelwood*, 433 U.S. at 307-08. Two, and related to the preceding principle, it is not necessary that judicial findings of discrimination be made before a public employer provides race conscious relief via a consent decree. *Howard v. McLucas*, 871 F.2d 1000, 1008 (11th Cir. 1989) (citing *Wygant*). Finally, although at

the outset the City denied engaging in racial discrimination, the City subsequently acknowledged that past practices might have given rise to " 'an inference of a pattern or practice of discrimination' " against minorities. *Youngblood*, 925 F.2d at 955.

The next two points were alluded to earlier. One, the City implements hiring *goals* pursuant to the consent decree, not quotas similar to those in *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) which the Petitioners cite for support. Hiring goals do not "unnecessarily trammel the interests" of the white applicants, nor are they "an absolute bar" to the white applicants' attaining positions with the Fire Division.[9] *Johnson*, 480 U.S. at 630. The United States Court of Appeals for the Sixth Circuit has specifically found that the "dual list" system implemented pursuant to the Consent Decree "does not contain quotas", but rather, it contains hiring goals. *Youngblood v. Dalzell*, 804 F.2d at 364.

Moreover, unlike the Petitioners' arguments, the City hires only qualified minorities as Fire Recruits. Each individual must pass all five tests that make up the Fire Recruit hiring process. The fact that a white applicant scored higher on the written test than a minority applicant does not violate this Court's requirement that the prospective pool of employees must be "qualified". Under the City's written test, a qualified applicant is one who attains a score of seventy (70) or above. The City only hires applicants who attain a score of seventy or

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[9] As previously mentioned, many of the original Petitioners have subsequently obtained employment as firefighters in the Fire Division.

above, each of whom are therefore "qualified". As the court of appeals below concluded, "[t]he [written] test merely ensures, as required by the consent decree, that each fire recruit is 'qualified' " (Petitioners' App. 24 (referring to Paragraph 22 of the Consent Decree (Petitioners' App. 41)). The written test accomplishes this goal, and as the court below concluded, "each of the minorities placed on the eligible list was qualified to be hired" (Petitioners' App. 24).

Secondly, the challenge here revolves around the *hiring* of Fire Recruits. Compared to more intrusive remedial actions such as affirmative action plans that involve race-conscious promotions and layoffs, which necessarily effect job security, benefits, and seniority, "in cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." *Wygant*, 476 U.S. at 282. "Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury as layoffs impose." *Wygant*, 476 U.S. at 282.

As a final note, this Court requires that a non-minority party challenging the application of an affirmative action plan has the ultimate burden of establishing that their constitutional rights have been violated. *Wygant*, 476 U.S. at 277-78, 293. Taking into account all the factors previously discussed, the Petitioners have not met this burden.

Although necessary to refute some of the Petitioners' claims, the prior discussion was not necessarily required for this Court to decide whether to grant a writ of certiorari to the Sixth Circuit. That is because the issue that

the Petitioners claim is before this Court is not the correct issue presented. Rather, the issue is much narrower, and can be addressed briefly. The proper issue has been framed by two of this Court's recent decisions.

In *Rufo*, 112 S.Ct. at 757, this Court held that modification of a consent decree is subject to Federal Rule of Civil Procedure 60(b). In *Dowell*, 111 S.Ct. at 638, this Court concluded that before modifying a desegregation decree intended to remedy past discrimination against African-Americans, the district court must determine "whether the vestiges of past discrimination had been eliminated to the extent practicable." In considering whether the vestiges of discrimination had in fact been eliminated, "the District Court should look at not only student assignments, but 'to every facet of school operations – faculty, staff, transportation, extracurricular activities and facilities.' " *Dowell*, 111 S.Ct. at 638. From these two cases, two clear legal principles evolve:

(1) When a party seeks to modify a valid consent decree, a district court should apply the standards of Fed.R.Civ.P. 60(b) and this Court's decision in *Rufo*.

(2) To determine, in fact, whether all the goals of the decree have been met, the district court must look at all the germane facts to the extent practicable, as in *Dowell*.

As to the first principle, two of the most widely recognized requirements of Rule 60(b) are that it is an extraordinary remedy which is not to be lightly granted, *e.g.*, *Ackermann*, 340 U.S. at 202; *Mallory*, 922 F.2d at 1281, and that a motion thereunder does not bring up the original judgment (the decree in this case) for review. *E.g.*, *Browder v. Director, Dept. of Corrections*, 434 U.S. 257,

263 n.7, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978) (and cases cited). Also, "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants a revision of the decree." *Rufo*, 112 S.Ct. at 760. The district court below, however, did not apply Rule 60(b) to the consent decree at issue in this case, nor did it have the guidance of *Rufo* (Petitioners' App. 1-12).

As to the second principle, at the very least, it would require the district court to respond to claims by a certified class of African-Americans who intervened in the lawsuit claiming ongoing discrimination within the Fire Division. Surely, this Court's instruction that "district court should address whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable" would require a district court to take into account claims by the African-American class that the vestiges of prior discrimination had not in fact been eliminated. *Dowell*, 111 S.Ct. at 638. The decision below applied prior circuit precedent entirely consistent with the instruction in *Dowell* and which held that "[b]efore the district court dissolves the decree, it must determine that the goals of the consent decree have been achieved *and must consider all objections to such dissolution*" (Petitioners' App. 28, *citing Youngblood*, 925 F.2d at 961). As the court of appeals below found, however, the district court did not address the claims by the African-American class *that were pending before the district court* (Petitioners' App. 29) (emphasis added).

A recent case out of the First Circuit is on all fours with the case at bar. *See Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992). The factual background in *Mackin*

was almost identical to the case *sub judice*: White applicants for positions as municipal firefighters scored higher on the written examination portion of the selection process than did certain minority applicants, yet were ranked below the minority candidates. 969 F.2d at 1274-75. The white applicants were ranked below some of the minority applicants because of a consent decree entered into in 1974 that set certain hiring goals for minorities. *Mackin*, 969 F.2d at 1274-75. The consent decree was implemented through a system where the eligibility list was to consist of one minority candidate for each white candidate. *Mackin*, 969 F.2d at 1274 n.2.

The legal analysis employed by the court was also similar to the legal principles the City-Respondents urge should be applied in the case *sub judice*. Citing *Rufo* and *Dowell* in the same paragraph, the First Circuit employed an analogous legal standard applied by the City-Respondent. In short, the court required the white applicants to meet their burden of showing that changed circumstances warranted the modification of the consent decree by the district court (citing *Rufo*) and that the district court should determine whether the goals of the decree had been completely achieved (citing *Dowell*). *Mackin*, 969 F.2d at 1275-76.

The court further reasoned that only qualified minority applicants were considered for employment; that the affirmative action plan gave only a limited advantage, not a guarantee of employment, to these qualified applicants; and that no legitimate, firmly rooted expectations on the part of the white applicants were disturbed. *Mackin*, 969 F.2d at 1278. These reasons were similarly addressed by the City-Respondent, *supra*.

Accordingly, this Court should not accept a review of this case in part because of the state of the record below. The district court's order was on cross motions for summary judgment; therefore, many of the factual issues that need to be resolved before the Consent Decree can be modified have yet to be determined. It would be more prudent to wait until the fact finder determines, on remand, all the material factual issues rather than resolving this case without an adequate exploration of the facts. That is what the court of appeals below intended when it remanded the case to the district court (Petitioners' App. 30). Moreover, the reasons warranting review cited by the Petitioners – the circuit split and the inconsistent application of this Court's precedent – simply do not exist. Accordingly, review of the decision below should be denied.

CONCLUSION

For all the reasons set forth in this brief, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

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APPENDIX

Earl BILLISH, et al., Plaintiffs-Appellants,

v.

CITY of Chicago, et al., Defendants-Appellees.
CHICAGO FIRE FIGHTERS UNION, et al.,
Plaintiffs-Appellants,

v.

Richard M. DALEY, et al., Defendants-Appellees.
Nos. 90-1650, 90-2182.
United States Court of Appeals,
Seventh Circuit.
Argued December 7, 1990.
Decided May 4, 1992.
REARGUED EN BANC DECEMBER 15, 1992.
DECIDED MARCH 29, 1993.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 87 C 8731, 87 C 7295-James B. Zagel and James F. Holderman, Judges.

Before BAUER, Chief Judge, and CUMMINGS, CUDAHY, POSNER, COFFEY, EASTERBROOK, RIPPLE, MANION, and KANNE, Circuit Judges.

POSNER, Circuit Judge.

*1 We granted rehearing en banc to examine the following difficult and important question: In what circumstances can admitted racial discrimination, challenged as a violation of the equal protection clause because committed by an organ of state government, be upheld as a proper remedial measure when there has been no trial to determine whether the discrimination can survive "strict scrutiny"? For that is the constitutional standard applicable to

discrimination against as well as in favor of whites. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). A divided panel of this court upheld the district court's grant of summary judgment for the defendants in one of two cases that had been consolidated for appeal, but reversed it in the other, *Billish v. City of Chicago*, No. 90-1650, *Chicago Fire Fighters Union v. Daley*, No. 90-2182, on the ground that the district judge (a different one) had failed to apply the standard of strict scrutiny to the defendants' conduct. 962 F.2d 1269 (7th Cir. 1992). Because the district court decided the cases on summary judgment, we can affirm only if, had the record before the district court in the two cases been the record of a complete trial, the defendants would have been entitled to a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 251 (1986); *Cygnar v. City of Chicago*, 865 F.2d 827, 834 (7th Cir. 1989).

The cases are so similar that we can treat them as if they were one. Both involve challenges to racial favoritism in promotions within the uniformed ranks of the Chicago Fire Department. The ranks are firefighter, engineer, lieutenant, captain, and battalion chief, but the last is not in issue. Promotions are made on the basis of competitive examination. Eligibility to sit for an examination is limited to persons in the rank below, except that a firefighter may, if he wants, sit for the lieutenant's examination, and be promoted to lieutenant, without spending any time as an engineer. The record is silent on whether there is some minimum amount of time that one must spend in one's present rank before being eligible for promotion; but as examinations for promotion are not given every year, there would be delays in promotion

even if there were no required waiting periods. After an examination is administered and graded, the candidates are ranked from first to last on the basis of their grades and are placed in rank order on an eligibility list from which promotions to the next rank are made. All listed persons whose grades are above a cut-off point deemed to mark minimum eligibility – all, in short, who have a passing grade on the examination – are eligible for promotion to the next rank.

In 1986 the fire commissioner, defendant Galante, promoted eighteen lieutenants to captain on the basis of their rank order in a captains' eligibility list that had been compiled in 1979, the last time the captains' exam had been given. All the promoted lieutenants were white. Only two members of recognized minorities (blacks and Hispanics, so far as relevant to this case) were left on the list, and their scores on the captain's exam were well below the cut-off point. The commissioner asked the personnel department to lower the cut-off point, and it did. He then, early in 1987, promoted the two minority candidates to captain out of rank order. The plaintiffs in the *Billish* case are white lieutenants who had scores above the (old) cutoff point on the 1979 list and were passed over when the two minority lieutenants were promoted over them. They also complain because, the list having become all-white after the minority lieutenants were promoted to captain, the commissioner refused to make further promotions from the list, deciding instead to await the compilation of a new list based on a new exam.

*2 In 1987 new eligibility lists were compiled to guide promotion from firefighter to engineer and from lieutenant to captain. These lists were based on examinations

administered between 1985 and 1987; part of the engineer's exam was "race normed" to improve the scores of the blacks and Hispanics who took it. From these lists Commissioner Galante in 1987 ordered the promotion of 56 firefighters to engineer and 24 lieutenants to captain. The first 48 promotions to engineer were made in rank order and included 9 minority candidates; the last 8 promotions were of black firefighters taken out of rank order. The first 23 promotions to captain were made in rank order and included 5 blacks (no Hispanics); for the twenty-fourth, the commissioner reached down for a Hispanic and promoted him out of rank order. These departures from rank order were in conformity with a 25 percent goal, established by the Washington administration, for minority promotions in the fire department. The plaintiffs in the Chicago Fire Fighters case are the whites passed over for promotion to engineer or captain as a result of the promotion of nonwhites out of rank order in the 1987 eligibility lists.

The blacks and Hispanics promoted out of rank order to the detriment of the promotional opportunities of the plaintiffs in these two cases were promoted because of their race or ethnicity. The equal protection clause forbids states to give preference to persons on the basis of their race (or ethnicity, but this needn't be discussed separately), even if theirs is not the white race. *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 493; *United States v. City of Chicago,* 870 F.2d 1256, 1261 (7th Cir. 1989). To that extent the Constitution is truly colorblind. The Supreme Court has, however, carved an exception for the case in which discrimination against whites is necessary

to rectify previous discrimination in their favor committed by the state agency that is seeking to practice remedial discrimination. *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 509; *Wygant v. Jackson Board of Education,* 476 U.S. 267, 280 (1986) (plurality opinion); *Associated General Contractors of California, Inc. v. Coalition for Economic Equity,* 950 F.2d 1401, 1412 (9th Cir. 1991). We must decide whether the defendants have so far succeeded in bringing themselves within the exception that no reasonable trier of fact could doubt that the discriminatory promotions described above were appropriate remedial measures; only then would the defendants be entitled to summary judgment, foreclosing the plaintiffs' right to a trial. Since a discriminatory remedy, to pass constitutional muster, must discriminate no more than is necessary to rectify the discrimination for which it is the remedy, *City of Richmond v. J.A. Crosson Co., supra,* 488 U.S. at 505-08; see also *Wygant v. Jackson Board of Education, supra,* 476 U.S. at 274 (plurality opinion), we must consider not only whether the Chicago Fire Department ever discriminated unlawfully in favor of whites but also whether, if so, the curative measures taken in these two cases have been carefully designed to avoid unnecessary injury to white persons.

*3 Although there has never been a formal judicial determination that the Chicago Fire Department ever discriminated in favor of whites, we do not understand the plaintiffs to deny that, for at least a brief period of time after the date in 1972 on which Title VII of the Civil Rights Act of 1964 first became applicable to states and municipalities, the department was in violation of that

statute under a "disparate impact" theory of discrimination. The fact that when the city first came under the Act the percentage of blacks and Hispanics in the uniformed ranks of the fire department – 5 percent – was far lower than their percentage in the relevant labor market would not of course have established a violation, *Hazelwood School District v. United States*, 433 U.S. 299, 309 (1977), but the city appears to have violated the Act by not changing, when the Act became applicable to the city, the hiring practices responsible for this disparity, or showing that they were essential to the department's efficient operation. Id. at 309 n. 15. The objectionable hiring practices were, however, eliminated by a consent decree entered in 1974 in a suit against the city brought by the Department of Justice. Promotions were the subject of a separate consent decree, entered in 1980 in another suit by the Justice Department against the city. This decree required the fire department to compile new eligibility lists on the basis of new tests properly validated as fair to minorities, and in promoting from the old lists to engineer or lieutenant to promote one black or Hispanic for every four whites who were promoted.

Assuming, then, that there was actionable discrimination in favor of whites in hiring from 1972 to 1974 and in promotions from 1972 to 1980, we come to the question of the appropriateness of the fire commissioner's actions in 1987 as measures for rectifying that discrimination. Even if the measures had been required by the consent decree, which they were not – the decree contained no captain's quota at all, and the quotas for engineers and lieutenants were only 20 percent and are thus exceeded by the measures challenged here – this would not be a

defense. The plaintiffs were not parties to the decree and there was no judicial determination that the decree was necessary to rectify previous discrimination. *Martin v. Wilks*, 490 U.S. 755 (1989); *United States v. City of Chicago*, 978 F.2d 325, 330 (7th Cir. 1992); *People Who Care v. Rockford Board of Education*, 961 F.2d 1335, 1337 (7th Cir. 1992); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1456-58 (8th Cir. 1991). The decree moreover was entered before the *Croson* decision made clear that reverse discrimination is subject to strict scrutiny. The civil rights amendments enacted in 1991 forbid challenges to civil rights consent decrees by persons having "actual notice" of the decree and a "reasonable opportunity to present objections" to it, 42 U.S.C. sec. 2000e-2(n)(1)(B)(i), but the city does not argue either that the provision applies to this case or that, if it did, it would bar these suits.

*4 We have three sets of promotions to consider. The first, of 20 lieutenants to captain, was from an old eligibility list – that is, an eligibility list based on an examination given before the 1980 consent decree: the 1979 list of lieutenants who had taken the then most recent captain's test. The second set of promotions was of the 56 firefighters promoted to the rank of engineer on the basis of an examination given in 1985. The third set consisted of the 24 lieutenants promoted to captain on the basis of a two-part examination given in 1986 and 1987.

The city's strongest case for legitimate remedial discrimination involves the promotion of the two minority lieutenants to captain in January 1987. At the time, the only eligibility list for captain had been compiled in 1979 on the basis of an examination that had not been validated for racial neutrality. Neither of the two minority

lieutenants on that list had sc[illegible]es above the cut-off point. The commissioner had just ordered the promotion of eighteen lieutenants from the list – all white. Only 4 percent of the captains in the Chicago Fire Department at the time were nonwhite, while 29 percent of the firefighters (the lowest rank) were. By reaching down to the two minority lieutenants who were below the cut-off point, the commissioner caused 10 percent of the promotions to captain to be of nonwhites, and this was a percentage such lower than that of nonwhites in any of the lower ranks.

Yet at the time the commissioner acted, it was plain that the compilation of a new eligibility list, one based on examinations designed under the aegis of the consent decree and therefore presumptively unbiased, was only months away, for the department had already administered the first half of a new captains' test. And in fact by October 1987 the new eligibility list had been compiled and new promotions made from it. It is not argued that the department had a desperate need for two more captains in January, that it couldn't wait till October. It seems that, distressed by the all-white composition of the group of captains appointed in the latest round of promotions, Commissioner Galante decided to appoint possibly unqualified blacks without waiting to see how blacks would perform on a race-neutral examination. If that is what happened – a question for trial – it would not bespeak the kind of sensitivity to the importance of avoiding racial criteria in making employment decisions, whenever it is possible to do so, that *Croson* requires. It should be unnecessary to add that a public employer cannot be allowed to justify reverse discrimination by the

bootstrap method of an alternating sequence of racial promotions (or hires). That is, the city cannot get points for first using a presumptively biased eligibility list to make a string of white promotions and then turning around and trying to do some rough racial justice by promoting two blacks from the bottom of the list.

Of course if the city had a desperate need for twenty captains just then, and the only eligibility list it had was based on a quite possibly biased examination that had been given in 1979, a modest departure in favor of remedial racial balance might well be justified. When the new captains' examination was finally administered, 21 percent of the lieutenants promoted to captain on a strict rankorder basis with no racial favoritism were black, which is more than twice the percentage under the old list even after Commissioner Galante promoted the two black lieutenants out of rank order. But the record does not reveal whether the city had an urgent need for twenty captains and thus could not await the administering and scoring of an unbiased exam.

*5 If on remand the promotion of the two black lieutenants out of rank order does not survive strict scrutiny, it does not follow that the *Billish* plaintiffs will win. They have no vested rights in their position on an eligibility list compiled on the basis of an examination that may have been biased in favor of whites. They will have to show that if promotions had been delayed until the 1987 list was available, and made from that list, they would have been promoted sooner than they were.

The engineer examination administered in 1985 was devised by the city, of which Harold Washington, a black,

was now the mayor, with the aid of an academic expert; in consultation with the Justice Department, which had brought the suit concluded by the consent decree entered in 1980; and in apparent or at least intended conformity with the EEOC's guidelines for "content validation" of employment tests. 29 C.F.R. sec. 1607.5. Moreover, the examination was approved by the district court. The first part of the examination was a written test. The ratio of the minority pass rate to the white pass rate was less than the 80 percent benchmark that the EEOC and other federal agencies use to decide whether an employment test has a racially adverse impact. So the city raised the minority candidates' scores sufficiently to increase the ratio to 84 percent. Candidates could sit for the second half of the examination, a "hands on" practical test (operating a fire-engine simulator), only if they passed the written test, the scores on which, as we just noted, had been adjusted to minimize the adverse impact on blacks and Hispanics. The practical test did not require a racial adjustment, because on it the ratio of the minority to the white pass rate was 87 percent. Rank order on the eligibility list for promotion to engineer was based on performance on the practical test, weighted 10 percent by seniority.

Had the department stuck to rank order, 10 of the 56 firefighters promoted to engineer would have been black or Hispanic, which is 18 percent, very near the quota set by the consent decree. Instead, by promoting 8 more nonwhites, taken out of rank order, the department raised this percentage to 30 percent. Yet not only had the examination been approved by the parties to the consent decree – by the Justice Department, which had originally

challenged the fire department's promotion procedures as unlawfully discriminatory in favor of whites, and by the City of Chicago, which under the Washington administration could hardly be though insensitives to the interests of minority groups. *Auriemma v. Rice*, 910 F.2d 1449, 1451 (7th Cir. 1990) (en banc); *Cygnar v. City of Chicago*, 865 F.2d 827, 835 (7th Cir. 1989); *United States v. City of Chicago*, 870 F.2d 1256, 1257-58 (7th Cir. 1989); *United States v. City of Chicago*, 894 F.2d 943, 949 (7th Cir. 1990) (concurring opinion). In addition, the scores on the examination had been altered to improve the performance of nonwhites – the practice of "race norming" now forbidden by federal law. 42 U.S.C. sec. 2000e-2(1). In these circumstances, the departures from rank order could not be justified – at least with the certitude required to head off a trial – on the ground that the order had been based on a discriminatory test.

*6 The City has, it is true, presented evidence that the test which it devised was subtly, unconsciously, biased in favor of whites, after all. The evaluation of that evidence is a matter for trial. That the city was determined to achieve or exceed its new goal of 25 percent minority promotions. regardless of what any test showed, is suggested by its insistence that "content validation" is not an adequate method of validating an employment test. To validate a test for content means to establish that it tests for skills or knowledge used on the job: a typing test for secretaries, for example. The city designed the engineers' test as one that would be content validated, as distinct from a "criterion validated" test, which tests qualities predictive of or correlated with job performance (such as IQ). The law is clear that either method of validation is

proper. *Gillespie v. Wisconsin*, 771 F.2d 1035, 1040-41 (7th Cir. 1985); 29 C.F.R. sec. 1607.5(A). Now the city has backtracked, claiming that content validation is no good, and even suggesting that the fact that whites do better than others on a test proves that the test is biased even if it has been validated. Again, the law is to the contrary. "There is no iron law of human behavior that every racial or ethnic group will perform equally well on nonbiased examinations in all fields of human endeavor." *United States v. City of Chicago, supra*, 870 F.2d at 1261; see also *City of Richmond v. J.A. Croson Co., supra*, 488 U.S. at 503. The city's grounds for rejecting the results of its test sound like pretexts designed to give the city more freedom to practice reverse discrimination by departing from rank order fixed by nonbiased tests. It will require a trial to determine whether this is in fact the city's motive in repudiating its own test.

The city argues that the disparity between the percentage of minority firefighters (29) and the percentage of minority engineers (11) justified heroic efforts, even ones that might require disregarding the results of a perfectly fair test, to advance minority firefighters by way of remedy for previous discrimination in favor of whites. The disparity by itself proves little, and this for two reasons. First – a point explained next – the much larger percentage of entry-level blacks and Hispanics may reflect nonactionable discrimination in years past. Second, the larger minority fraction of firefighters than of engineers may have reflected, to a degree as yet unexplored, the effects of a 50 percent minority hiring quota fixed in the 1974 consent decree. If, to take an example closer to home, law schools through their affirmative-action programs

increased the percentage of minority law students to 10 percent, the fact that law school faculties were on average only 2 percent black would not be evidence of discrimination in appointments to faculty positions. The larger fraction of minority students would be an artifact of the law schools' having lowered their admission standards and not a true measure of the pool from which faculty would be recruited.

*7 We come to the last set of promotions. Had the city promoted lieutenants to the rank of captain on the basis of the 1987 captains' eligibility list strictly on the basis of rank order, 5 out of the 24 promotions, or 21 percent, would have been of minority candidates – all as it happened black. Apparently distressed that none of the successful candidates was Hispanic, the fire commissioner promoted a Hispanic lieutenant to captain out of rank order. The result was to increase the minority representation in the promotions from 21 to 25 percent. The City points to the very small percentage of minority captains in 1987 – only 4 percent – and asks us to infer that this must have been a legacy of discrimination. Although the record contains no evidence on the required or average waiting period in one rank before promotion to the next, it is common sense that working one's way up the ladder to the fire department's second-highest rank may well take many years. Hence a consequence of the very low hiring of minority firefighters before 1974 may have been that in the middle 1980s only a tiny fraction of captains consisted of blacks and Hispanics. From this it can be argued that racial discrimination in their favor was necessary to bring the percentage of captains from these groups nearer to where it would have been but for the

discrimination that the groups had experienced many years earlier.

This of course is possible, but has not been shown, and in fact is unlikely. Recall that, so far as appears, the city was guilty of no actionable discrimination in hiring for the fire department until 1972, and that the discrimination was rectified in 1974. That the small fraction of minority captains in the mid-1980s was due to any very great extent to the limited hiring of minority firefighters between 1972 and 1974 is implausible. Of course it is possible that the city had been violating the Constitution, and not just the standards of Title VII not yet applicable to it, before 1972, by engaging in intentional discrimination in favor of whites. But of this there is no evidence. And it is difficult to see how discrimination aimed at remedying conduct lawful when engaged in (that is, before 1972) could be thought remedial in the relevant sense and survive strict scrutiny; the Court's dicta suggest it could not. *City of Richmond v. J.A. Croson Co., supra,* 488 U.S. at 500; *Wygant v. Jackson Board of Education, supra,* 476 U.S. at 289 (O'Connor, J., concurring); *Regents of University of California v. Bakke,* 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

Another possibility is that minority captains were so few in the mid-1980s not because there were so few minority hires before 1974 but because of discriminatory promotional policies not rectified until the 1980 consent decree – indeed not until later, since promotions based on validated captains' tests were not made until 1987. That is another issue requiring further exploration.

Even disregarding these points, we note that, by 1987, 14 percent of the lieutenants in the fire department were black or Hispanic, and with a higher percentage of black and Hispanic lieutenants than this – 21 percent – being promoted to captain without any "race norming" or other discrimination in their favor on the captain's examination, there would in all likelihood soon have been a large percentage of minority captains even if promotions were made on a colorblind basis. The question becomes whether accelerating the process by departing from colorblind procedures was justifiable as a means for rectifying the discrimination in which the department may have engaged in the 1970s. Perhaps so, but an alternative possibility – supported by the testimony of the city's own expert that rank-order promotion from the 1987 captains eligibility list would have yielded 4.7 percent Hispanic promotions, the only problem being that there were no Hispanics in the first group to be promoted from the list – is that the department was merely trying to curry favor with Hispanics by promoting a Hispanic lieutenant out of rank order. It is impossible to choose between these hypotheses on the basis of the record compiled in the summary judgment proceedings.

*8 There is concern and resentment about the use of policies of affirmative action or (more bluntly) reverse discrimination to practice a form of racial politics that is the mirror image of discrimination against blacks and other minority persons. There is fear that persons who have not been discriminated against will be advanced at the expense of persons who have neither practiced nor benefited from discrimination. The Supreme Court in the Croson decision made clear that cities and states would

have to furnish convincing evidence that their affirmative-action programs were not of this character but were instead sensitive, good-faith measures to remedy the unlawful practices in which they had engaged in the past. The defendants have not shown this strongly enough to permit the dismissal of the plaintiffs' claims without a trial.

These cases, filed in 1987, were first argued in this court more than two years ago. We regret the delay in deciding them and would like to bring them to an end but have concluded that it was premature to terminate them by a grant of summary judgment. In the hope of expediting the proceedings that must resume in the district court we direct that the cases be consolidated in that court and assigned to a single judge.

REVERSED AND REMANDED, WITH DIRECTIONS.

RIPPEL, Circuit Judge, with whom BAUER, Chief Judge, CUMMINGS, and CUDAHY, Circuit Judges, join, dissenting.

These cases were resolved correctly, according to the law and the facts, in the panel opinion. 962 F.2d 1269 (7th Cir. 1992). For the reasons set forth in that opinion, the judgment in *Billish v. City of Chicago* (No. 90-1650), should be affirmed in part and reversed and remanded in part. The judgment in *Chicago Fire Fighters Union v. Daley* (No. 90-2182), should be affirmed.

(3)

No. 92-1555

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1992

TIMOTHY JANSEN, DANIEL K. GOENS, ROBERT H. PRASSE, EVAN WOOD, and MARC E. MONAHAN;
and
WILLIAM NEAL, BRIAN CLEMENS, FRANK GORRASI, GREGORY HISSETT, and PHILIP S. RAMSTETTER;
and
DANIEL R. CORRY, NOAH H. GIBBS IV, TIMOTHY B. BURWICK, LAWRENCE D. CAPPEL, ROBERT HART, JEFFREY H. SWEET, MARK E. KREIMER, NICHOLAS SCHIBI, and TIMOTHY A. CUNNINGHAM,

Petitioners,

vs.

CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION, WILLIAM MILLER, and NORMAN WELLS;
and
TILFORD YOUNGBLOOD, RALPH NICHOLS,
and
THE PLAINTIFF CLASS CONSISTING OF BLACK APPLICANTS FOR AND BLACK EMPLOYEES OF THE DIVISION OF FIRE OF THE CITY OF CINCINNATI,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS (Youngblood, et al.) IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a city may use race as a basis for preference in hiring firefighters pursuant to a remedial Consent Decree, where the facts underlying the decree demonstrate a virtual exclusion of African-Americans from the work force and where hiring based on a competitive written examination would result in disproportionate adverse impact against African-Americans.

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1. WHETHER A CITY MAY USE RACE AS A BASIS FOR PREFERENCE IN HIRING FIREFIGHTERS PURSUANT TO A REMEDIAL CONSENT DECREE, WHERE THE FACTS UNDERLYING THE DECREE DEMONSTRATE A VIRTUAL EXCLUSION OF AFRICAN-AMERICANS FROM THE WORK FORCE AND WHERE HIRING BASED ON A COMPETITIVE WRITTEN EXAMINATION WOULD RESULT IN DISPROPORTIONATE ADVERSE IMPACT AGAINST AFRICAN-AMERICANS 9

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No. 92-1555

In The

Supreme Court of the United States

October Term, 1992

TIMOTHY JANSEN, DANIEL K. GOENS, ROBERT H. PRASSE, EVAN WOOD, and MARC E. MONAHAN;
and
WILLIAM NEAL, BRIAN CLEMENS, FRANK GORRASI, GREGORY HISSETT, and PHILIP S. RAMSTETTER;
and
DANIEL R. CORRY, NOAH H. GIBBS IV, TIMOTHY B. BURWICK, LAWRENCE D. CAPPEL, ROBERT HART, JEFFREY H. SWEET, MARK E. KREIMER, NICHOLAS SCHIBI, and TIMOTHY A. CUNNINGHAM,

Petitioners,

vs.

CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION, WILLIAM MILLER, and NORMAN WELLS;
and
TILFORD YOUNGBLOOD, RALPH NICHOLS,
and
THE PLAINTIFF CLASS CONSISTING OF BLACK APPLICANTS FOR AND BLACK EMPLOYEES OF THE DIVISION OF FIRE OF THE CITY OF CINCINNATI,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS (Youngblood, *et al.*) IN OPPOSITION

Respondents, Tilford Youngblood, *et al.*, respectfully request that this Court deny the petition for a writ of certiorari for review of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on October 13, 1992 (suggestion for rehearing *en banc* denied December 29, 1992).

STATEMENT OF THE CASE

A. INTRODUCTION

This reverse discrimination case is a collateral attack by several white applicants on a consent decree which has governed hiring and promotions of firefighters in the City of Cincinnati for a number of years. The City of Cincinnati carried out the hiring challenged by petitioners pursuant to the Consent Decree in *Youngblood v. Dalzell*, Civil No. 90-8774 (S.D. Ohio 1974).

Under the Consent Decree, the City is permitted to use a written examination as one of the components in its hiring and selection system. However, the Consent Decree prohibits the use of selection devices, including written examinations, which have a discriminatory impact on minorities.[1] In addition, the Consent Decree specifically prohibits using differences in test scores unless the written exam has been validated for that purpose in accordance with regulations of the Equal Employment Opportunity Commission. (Para. 25, Pettrs.' App. 25).

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[1] Para. 25, Petitioners' App. 38. Under the Consent Decree, minorities are defined to consist of African-Americans.

In this case, there was unrebutted evidence before the District Court that the written examination had a disparate impact on minorities, and the City remedied this disparate impact by its affirmative action hiring. There was also undisputed evidence that the written examination had not been validated for purposes of rank order hiring.

The District Court did not reach the constitutional issue raised by petitioners. Rather, it interpreted the Consent Decree and erroneously concluded that the City's affirmative action hiring was not authorized by the Consent Decree. The Court of Appeals vacated that determination and remanded for further proceedings in light of a previous ruling in *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991). The petition for certiorari followed.

B. HIRING UNDER THE CONSENT DECREE

The *Youngblood* respondents herein commenced *Youngblood v. Dalzell* in 1973, alleging that the City was engaged in a pattern and practice of discrimination based upon race in recruiting, testing, selecting and hiring applicants for the position of fire recruit and in the promotion of firefighters in the Division of Fire. The *Youngblood* class sought vindication of their rights under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981 and 1983. In 1973, when the action was commenced, only one-half of one percent of Cincinnati firefighters were African-Americans. *Youngblood v. Dalzell*, 568 F.2d 506, 508 (6th Cir. 1978). Thus, in 1973, only five of approximately 900 firefighters in the City of Cincinnati were African-Americans.

The *Youngblood* Consent Decree recognized that there was a manifest imbalance in the racial composition of the Fire Division work force. In the Consent Decree at paragraph 5, the City acknowledged that its past practices raised an inference that a pattern or practice of discrimination may have occurred. (Pettrs.' App. 32).

The parties in *Youngblood* entered into the Consent Decree with the purpose of eliminating discriminatory selection devices and achieving racial integration in the Fire Division. The first sentence of paragraph 22 of the Consent Decree states that " . . . defendant shall adopt and seek to achieve a goal of hiring sufficient numbers of qualified minority persons to achieve a work force composition which will not support any inference of racial discrimination in hiring." (Pettrs.' App. 41). Paragraph 21 of the Consent Decree provides in relevant part that the City shall not "engage in any other practice or policy which has the purpose or effect of discriminating against any minority applicant. . . . " (Pettrs.' App. 40). The City and the *Youngblood* respondents agree that the overall purpose of the Consent Decree is to eliminate discriminatory selection devices and, subject to the availability of qualified applicants, to achieve a racially integrated work force in the Fire Division. It is undisputed that the City hired only persons qualified to be firefighters.

With respect to written examinations, the Consent Decree permits written examinations to be part of the selection process if they are "content valid." (Para. 16, Pettrs.' App. 38). The Consent Decree also requires the

City to ignore differences in test scores when those differences do not predict a significant difference in job performance. In this regard, paragraph 25 of the Consent Decree states in relevant part,

> [s]cores on selection procedures which have not been validated in accordance with the EEOC guidelines or scores on validated standards which are not sufficiently different as to predict a significant difference in job performance shall not be used in determining the qualification of applicants.

One other goal of the Consent Decree was that the City achieve 18% minority representation in the Fire Division by 1980. As a result of hiring under the Consent Decree, the Fire Division was 7% minority in December of 1976; however, layoffs then reduced the percentage of African-Americans to 4.4%. *Youngblood v. Dalzell*, 568 F.2d 506, 507 (6th Cir. 1978). At the end of 1980, only 9.6% of the Fire Division personnel were black. Thus, the City fell far short of achieving 18% minority representation by 1980. The Consent Decree was modified to increase the time for the City to increase minority representation, with December 31, 1985 being the date for achieving the 18% minority representation. (Pettrs.' App. 48). The City failed to achieve this. It is undisputed that the Fire Division did not become 18% minority until 1987.

The parties to the Consent Decree agree that the overall goal of integration in the Consent Decree is separate and in addition to the 18% goal, which was never met in a timely manner. The parties also agree that the use of dual lists was authorized by the Consent Decree. Furthermore, the use of dual lists was necessary to

remedy the disparate impact resulting from the written examination used by the City in hiring in the years at issue in this case.

The petitioners in this action contend that, because their written test scores were higher than scores of some of the minorities who were hired, their rights were violated. However, the *Youngblood* respondents presented unrebutted evidence to the District Court that the written examination had a marked adverse impact on minorities. (App. 21-34).[2] The affidavit of Dr. Charles Cranny, an industrial psychologist employed by *Youngblood* respondents, demonstrated that the written examinations did have such a disparate impact, which would only be remedied by affirmative action. *Id.* Indeed, it is apparent just from the face of the eligible list that the test had an adverse disproportionate impact on minorities. Of the 115 highest scoring applicants in 1988 to 1990 on the eligible list, less than ten were African-Americans. 977 F.2d at 243. The factual record was undisputed that the written examination was not valid for hiring by test score differences. *Id.*

In spite of the existence of undisputed evidence of disparate impact, the District Court granted summary judgment for the petitioners. The Court of Appeals ruled that this was improper and reversed the grant of summary judgment.

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[2] Paragraph 16 of the Consent Decree prohibits the City from using a written test which has a disproportionate adverse impact on minorities unless it has been validated pursuant to EEOC regulations at 29 C.F.R. § 1607.1, *et seq.*

ARGUMENT

I. REASONS FOR DENIAL OF THE WRIT OF CERTIORARI

This Court has addressed the constitutionality of affirmative action plans in a number of cases in recent years. The law in this area is well developed, and there is no reason for this Court to review this case.

When assessing the constitutionality of affirmative action plans, this Court has consistently evaluated these plans using a two part test. First, the plan must be adopted after there is sufficient evidence that remedial action is warranted. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986). Second, the plan must be narrowly tailored to achieve its purpose. *Id.* at 279. This test has been employed by this Court in varying challenges involving claims of reverse discrimination in a private employer's training program, *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); union hiring goals, *Local 28 of the Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421 (1986); layoff preferences for minorities, *Firefighters Local Union No. 1784 v. Stotts*, 476 U.S. 561 (1984); race and sex-conscious promotion provisions contained in an affirmative action plan, *United States v. Paradise*, 480 U.S. 149 (1987); *Local Number 93, International Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Johnson v. Transportation Agency, Santa Clara Cty., Cal.*, 480 U.S. 616 (1987); and challenges to minority set aside plans, *City of Richmond v. Croson*, 488 U.S. 469 (1989).

Under *Martin v. Wilks*, 490 U.S. 755 (1989), the petitioners may have standing to challenge the constitutionality of the City's hiring practices, but they do not

have standing to contest whether the City's interpretation of the Consent Decree is correct.

In this case, the District Court did not reach the constitutional issues raised by petitioners. Rather, the Court ruled erroneously that the hiring goals of the Consent Decree had been met and that affirmative action could no longer be practiced. As the Court of Appeals ruled, the petitioners did not have standing under *Martin v. Wilks*, 490 U.S. 755 (1989) to challenge the parties' interpretation of the Consent Decree and urge their own view of it. The Court of Appeals evaluated the challenged practices of the City using the proper constitutional test and remanded the case for proceedings consistent with its opinion.

The adoption of the Consent Decree and the challenged hiring practices carried out under it were supported by a compelling government interest. Further, the hiring methods used by the City were narrowly tailored to meet the important goals of the Consent Decree.

This appeal does not squarely present important constitutional issues in a way to justify granting a petition for certiorari. This Court should deny the petition just as it did in *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, ___ U.S. ___ (1992).

II. QUESTION PRESENTED FOR REVIEW

1. WHETHER A CITY MAY USE RACE AS A BASIS FOR PREFERENCE IN HIRING FIREFIGHTERS PURSUANT TO A REMEDIAL CONSENT DECREE, WHERE THE FACTS UNDERLYING THE DECREE DEMONSTRATE A VIRTUAL EXCLUSION OF AFRICAN-AMERICANS FROM THE WORK FORCE AND WHERE HIRING BASED ON A COMPETITIVE WRITTEN EXAMINATION WOULD RESULT IN DISPROPORTIONATE ADVERSE IMPACT AGAINST AFRICAN-AMERICANS.

a. The petitioners do not have standing to enforce their own interpretation of the Decree.

Petitioners, who are not parties to the Decree, argue that the Decree does not authorize the affirmative action program that the parties had used for 15 years. The Sixth Circuit, relying on *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), held that petitioners who are not parties to the consent decree lack standing to have that decree interpreted upon their own terms. *Jansen*, 977 F.2d at 242. The Court did recognize petitioners' right to challenge the constitutionality of the decree under *Martin v. Wilks*, 490 U.S. 755 (1989).

The Sixth Circuit ruling follows this Court's precedent and needs no review. The Sixth Circuit also followed its own recent decision in *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, ___ U.S. ___ (1992) (challenge to police consent decree). Moreover, this Court's decision in *Martin, supra*, has been overridden by Section 108 of the Civil Rights Act of 1991, so future

decisions affecting the rights of nonparties to decrees will be made in light of the Act. This Court should not accept a case now on an issue that is unlikely to recur.

Regardless of the Civil Rights Act, the issue of petitioners' right as nonparties to the Decree to impose their interpretation of the Decree on the parties should be permitted to "percolate" within the federal and state courts to allow a consensus to emerge. Petitioners cite no other case law that discusses this issue.

Finally, petitioners' interpretation of the Consent Decree is simply in error. Petitioners' arguments are addressed by the Court of Appeals in Part IIB of its opinion. Quite simply, the Consent Decree authorizes the City to employ affirmative action to mitigate the discriminatory impact of written examinations which have not been validated for ranking applicants by differences in passing scores. Certainly, this Court should not entertain a debate about the meaning of the Consent Decree's terms at this late date in its history.

b. The City's use of affirmative action was justified by its compelling interest in remedying discrimination in the Fire Division.

Contrary to petitioners' arguments, an actual finding of discrimination is not a prerequisite to affirmative action in hiring. In the case of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), Justice O'Connor, concurring in the judgment, harmonized the various positions taken by the Justices to describe this Court's test for judging the constitutionality of race conscious affirmative action plans. The first part of the two part test concerned

the factual basis, and in this regard Justice O'Connor said:

> [T]he Court is in agreement that [the] . . . remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.

Wygant, supra, 476 U.S. at 289. The *Wygant* decision stands for the proposition that evidence of statistical disparity "sufficient to support a prima facie Title VII pattern or practice claim" justifies affirmative action in employment. *Id.* at 292 (O'Connor, J., concurring).

This Court returned to this issue in *City of Richmond v. Croson*, 488 U.S. 469 (1989), where the 30% minority set aside program for city contractors was struck down. In a majority opinion drafted by Justice O'Connor, the Court again reaffirmed that a governmental body could practice affirmative action without a specific finding of discrimination from a court. The Court noted that, "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern and practice of discrimination." *Id.*, 488 U.S. 469 at 497 (quoting *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977)).

In the instant case, the necessary factual predicate exists. When the Consent Decree was signed, less than one-half of one percent of the City's Fire Division was African-American. *Youngblood v. Dalzell*, 568 F.2d 506, 508 (6th Cir. 1978). There is no real debate that the virtual exclusion of minorities – five of 900 firefighters were black – gave rise to a prima facie case.

When the challenged hiring took place in 1988-1990, the City used a written examination which had a severe disproportionate impact on African-Americans. (App. 21-34). The petitioners presented no evidence to dispute the findings of respondents' industrial psychologist in this regard. Moreover, even if one assumes the written examination was valid to judge qualification on a pass/fail basis, there was no evidence to support the claim that higher test scores meant a better qualified applicant among those who passed. The respondents' expert found that the test was not valid for hiring by rank order, and this point was undisputed. Further, respondents' expert's opinion was corroborated by the City's personnel division, both in answers to interrogatories (App. 6 and 7) and in deposition testimony (App. 10, 16, 17, and 18). As the Court of Appeals recognized, "no evidence has been presented to indicate that the scores which result 'predict a significant difference in job performance.' " 977 F.2d at 243.

Quite simply, the petitioners are asking this Court to ignore the factual record and assume that a higher test score means a more highly qualified applicant. The factual record shows the opposite. If hiring had been done pursuant to test score, the City would have violated Title VII. The record supporting the Consent Decree in this action is precisely what this Court's decisions in *Wygant* and *Croson* hold to justify affirmative action in hiring.

c. The City's hiring actions were narrowly tailored to remedy the manifest racial imbalance in the Fire Division.

Once the required factual basis exists, a remedial plan must fit the problem to be addressed. As Justice O'Connor stated in *Wygant*, 476 U.S. 287:

> Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.

In *Wygant*, this Court noted that the burden on innocent white workers was greater in the context of layoffs than it is in the context of *hiring*. The Court in *Wygant* expressly approved of hiring goals:

> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job . . .
>
> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individual . . . [T]he Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive

> means of accomplishing similar purposes – *such as the adoption of hiring goals* – are available.

476 U.S. at 283 (emphasis added).

The petitioners did not meet their burden to show that the City's hiring practices were unnecessary and overbroad. *Wygant*, 476 U.S. at 277-78, 293.

It is important to recognize that only qualified applicants were hired. The Consent Decree provides that only qualified persons may be hired. Paragraph 25 states in relevant part that "[i]n no event shall the Division of Fire be required to hire a person as a fire recruit who is not qualified." There is no evidence anyone hired was unqualified.

The hiring goals in the instant case are narrowly tailored and not based upon general population statistics. In *Local 28 of the Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421 (1986), this Court approved a court order setting a 29% goal which was based upon the percentage of nonwhites in the labor pool. In the instant case, the undisputed evidence indicates the relevant labor pool to be those qualified to take the written exam. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989) (use of applicant flow data indicates qualified labor pool). Accordingly, the labor pool was approximately 40 percent African-American. (App. 29, 32). So the City's use of a 40 percent goal for minority hiring was appropriate.

In *Sheet Metal Workers v. EEOC, supra*, this Court stated that the 29% goal did not impose an undue burden on whites:

> While whites seeking admission into the union may be denied benefits extended to their non-white counterparts, the court's orders do not stand as an absolute bar to such individuals; indeed a majority of new union members have been white.

Id. at 479.

In the instant case, petitioners had no reasonable expectation that hiring would be based solely on written test scores. Moreover, far from being excluded from employment, at most their employment opportunities have only been delayed. At least nine of the petitioners have already been hired as Cincinnati firefighters in subsequent hiring rounds.

Had the City done as petitioners suggest and wrongly assumed that small differences in written test scores proved a meaningful difference in qualification and hired by strict rank order of test score, almost no African-Americans would have been hired in the hiring rounds at issue in this case. In using separate lists for blacks and whites pursuant to the Consent Decree in *Youngblood v. Dalzell*, the City avoided a prima facie violation of federal civil rights laws.

CONCLUSION

The record in this case does not support the petitioners' formulation of the question presented for review. The Court of Appeals properly applied precedent in reaching its decision. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY JANSEN, *et al.*,	:	Civil Action No. C-1-90-134
Plaintiffs,	:	Judge Rubin Magistrate Sherman
vs.	:	RESPONSE TO INTERVENORS' INTERROGATORIES TO CITY DEFENDANTS AND REQUEST FOR PRODUCTION OF DOCUMENTS
CITY OF CINCINNATI, *et al.*,	:	
Defendants.	:	
	:	

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, the intervenors submit these interrogatories to be answered by the defendants within thirty (30) days of service.

These interrogatories inquire as to all information in the possession, custody, control or within the knowledge of defendants and their present and former representatives, agents, and employees, including their attorneys of record in the instant litigation, and all other persons or entities acting on behalf of the defendants.

* * *

2. With regard to the examinations identified in response to Interrogatory 1, identify all documents which pertain to their validation within the meaning of the Equal Employment Opportunity Commission's (EEOC's) Uniform Guidelines.

The test company has validated the exams nationally and a transportability study was conducted locally.

3. Have defendants ever attempted to assess the impact of the examination procedures referred to in answer to Interrogatory 1 for permanent appointment to the positions with the Division upon black persons, and if so, describe in detail what was discovered, including, in particular, any information or data with respect to:

a. Whether such examinations and examination procedures discourage black persons from applying for such positions;

No study had been conducted in this area. However, the large numbers of minority candidates who sit for the written exam seems to indicate that they are not discouraged by the written test. It should also be noted that at the time of sign-up, candidates are supplied with information on the entire selection process. It is impossible to know if the applicants who fail to appear for the written test are discouraged by other parts of the selection process.

b. Whether such examinations and examination procedures are culturally biased in the sense that black persons are likely to do less well than white persons because of their different cultural and educational backgrounds;

No study has been conducted. There is some adverse impact on the written exam. However, the Consent Decree and the use of separate lists for majority and minority candidates alleviates the adverse impact.

c. The relative success black persons have achieved on said examinations as compared to white persons and reasons for any such differences;

No study had been conducted. The results of the exams indicate some disparate impact on the written test.

d. Identify all persons who performed such assessment or know the results; and

No assessment has been performed.

e. Identify all documents which pertain to all such assessments.

N/A.

4. Do the defendants contend that any of the examinations referred to in Interrogatory 1 have been determined to be valid by an empirical (criterion-related) validity study, and if so, do the defendants contend that such validity has been established in accordance with the Equal Employment Opportunity Commission (EEOC) Guidelines on Employee Selection Procedure? Identify all documents upon which this answer is based.

The examination is content valid, not criterion valid.

5. Have defendants determined whether persons who scored higher on the written examination administered in the 1987-89 hiring process can be expected to or actually perform better on the job?

No study has been performed by the Personnel Department.

6. What difference, if any, in scores on the written examination administered in the 1987-89 hiring process

are predictive of a significant difference in job performance as a Cincinnati firefighter?

Since the selection process consists of several components in addition to the written test (i.e. physical ability, medical, background/polygraph and more recently a psychological), it would be impossible to ascertain whether the written test alone is predictive of a significant difference in the job performance of a firefighter.

Additionally, the written test is designed to determine skills and knowledge at entry level. A 13 week training program is given to all Recruits to train them in all aspects of job performance.

App. 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY JANSEN, ET AL,	:	Civil Action
Plaintiffs,	:	C-1-89-079
vs.	:	
CITY OF CINCINNATI, ET AL,	:	
Defendants.	:	

The deposition of CAROL CALLAHAN, Witness herein, taken as on Cross Examination by the Plaintiff, pursuant to the Federal Rules of Civil Procedure, and notice issued to take deposition at the offices of the City Solicitor, Room 214 City Hall, Cincinnati, Ohio 45202 on Monday, December 17, 1990, at 2:00 p.m., before Vera L. Draper, a court reporter and Notary Public.

* * *

[p. 5] Q. I want to expand a bit on your answers to the intervenors, and we don't have to – Well, we can mark it. Let's mark this as Callahan Deposition Exhibit No. 1.

(Callahan Exhibit No. 1 was marked for identification.)

MR. WYLER: Were you referring to the ones August 10th, 1990?

MR. SCHRIDER: Yes, the answers.

Q. Let's take a took at those, Miss Callahan. Let's go to your answer to No. 3 which is on pages 5 and 6. Now do you see at the bottom where it starts 3-B and you are being asked to state whether the examination and examination procedures are culturally biased on the sense that black persons are likely to do less well than white persons because of their different cultural and educational background. You see that? And the answer was, "No study has been conducted."

Let me stop there for a second. In answering these interrogatories, I take it that your answer went to both the 1988 and the 1989 exam; is that correct?

A. Right.

MR. WYLER: At this point I would like to impose an objection to this line [p. 6] of questioning as immateral to the entire issue before the court in this case. Go ahead.

Q. Let me proceed with my irrelevant question, if I might. Your answer went to both the 1988 and 1989 exam, is that right; both sets of exams? Take a minute if you need to.

A. Yes. Yes, it did.

Q. And you go on to say, "There is some adverse impact on the written exam." That is true from the 1988 exam; right?

A. Right.

Q. And that is also true from the 1989 exam, isn't it?

A. Right.

Q. And at least with respect to the '88 exam, I'm going to show you what has been marked as Callahan deposition Exhibit No. 2.

(Callahan Exhibit No. 2 was marked for identification.)

Q. Do you recognize this?

A. This looks like that material that came from Dr. Cranny.

Q. Right. And you saw this in connection with the Youngblood deposition, didn't you – litigation, didn't you?

[p. 7] A. Right.

Q. You had a chance to check his calculations where he determines that at least with respect to the 1988 exam the four-fifths rule is missed by quite a bit; right?

MR. WYLER: Objection. Proper foundation.

A. I believe that we did not agree with this, I would have to go back and look but I thought that we did make changes on his figures.

Q. Well, we will check that. So let's at least find out what we do agree with. There is adverse impact on the '88 exam, maybe not as much as Craney says; is that right?

MR. WYLER: Objection.

A. Minorities did less well if that's what you are asking me, yes, absolutely.

Q. What is the difference between that and saying there is adverse impact?

MR. VOLLMAN: I think the adverse impact, I don't know whether it has an ordinary meaning or legal meaning, I think we should clarify that.

A. Well, since we have a consent decree and we always do 40 percent, I don't see that the [p. 8] process has adverse impact.

Q. I am speaking only of the test results.

A. The written test?

Q. That's correct. So confining our discussion to the written test, you would agree that the written test results demonstrated adverse impact?

MR WYLER: Objection.

A. Yes.

Q. Now again you would agree with that with respect to the '89 written test results as well; right?

A. That minorities did less well than majorities? Yes.

MR WYLER: Ongoing objection. Go ahead.

Q. Now you just – with respect to your statement about the consent decree, the City uses two lists, a majority list and a minority list; right?

A. Right.

Q. And from those two lists it selects the fire recruits; isn't that right?

A. That is correct.

Q. Now each of the written, all of the results from the written tests end up getting ranked by [p. 9] – all the

white or majority people are ranked by the order of their test score, and all the minority people are ranked by their test score?

A. Correct.

Q. If you didn't have the decree you would rank everyone in order of their test score, blending majority and minority people?

A. Correct.

Q. Now the City has been in litigation with various parties about the fire recruit process and the City has taken the position that certain parts of its selection process are validated; right?

A. Right.

Q. But this validation of the various tests applies to the written test, and applies to it with respect to whether people pass or fail the written test; isn't that right?

MR WYLER: Objection. For the purposes of clarification, my objection is an ongoing one to validation issues in this lawsuit. Go ahead.

Q. Let me rephrase it if I might.

When you rank people after they get their test scores, in these tests the person ranked No. [p. 10] 3 is no more qualified to be a firefighter by virtue of that score than the person ranked No. 10; right?

MR WYLER: Objection to the form of the question.

A. Between 3 and 10, probably not.

Q. And certainly the City has not done a test or a study to determine whether the ranking of a person in the third slot is predictive of better job performance than the person ranked in the 10th slot?

A. No, they have not done a study like that.

Q. Whatever validation studies the City has done or hired people to do don't address ranking people by test score, do they?

A. We don't address, the validation does not address ranking particularly, and there is always a standard measure of error on any kind of test procedure, between 3 and 10. I would say what you are saying is true, but between 3 and 110, I would say it does reasonably infer that the person with 3 is better qualified than 103.

Q. But your validation study doesn't approach the process that way, does it; doesn't approach it as a validating ranked series of test scores?

[p. 11] A. I believe the validation from the test company does.

Q. Well, let's talk about that. With respect to the 1988 validation study, or the 1988 test you have, you claim that there was a validation study?

A. Yes.

Q. Do you have it? Do you have the validation study?

A. The transportability study that we did, or the company's?

Q. Either.

A. I have ordered another one. I heard John say you didn't have it so I ordered another copy.

Q. So we don't have that here right now, but you ordered one?

A. Right.

Q. Was, with respect to the 1988 test, was there an additional study to determine whether the national test fit the Cincinnati Fire Department?

A. Yes.

Q. And where is that?

A. That is the transportability study.

Q. And did you bring one of these with you?

A. It is attached.

[p. 12] Q. Is that the same as this one?

A. Yes.

Q. You gave a different type of test in 1989 than you did in 1988?

A. No, not a different type but a different test.

Q. A different test would be subject to a different validity study?

A. No, not necessarily. What you are looking at are the minimum qualifications you need at entry level, which turn out to be on practically every test that is on the market today; test reading comprehension, basic math

skills and some kind of mechanical reasoning. The test we got in 1988 was exactly that same kind of these. It was from a different test company. The reason we got it is because we wanted to have a little bit different questions because the one from MEAS is the same questions over and over again. We wanted to have that people weren't memorizing what they had from the time before, but the validity study even for MEAS could apply to the 1988 test because what it is showing you is that these are the basic skills you need. We do not test for actual skills that you need to be a firefighter, we are just looking to see if you have the [p. 13] minimum skills to be trained as a firefighter.

Q. Let me show you what we will mark as Callahan Deposition Exhibit No. 3.

(Callahan Exhibits Nos. 3 and 4 were marked for identification.)

MR. WYLER: At this point I will say we have not been sent a copy of that and have not seen it.

Q. Do you recognize what has been marked as Callahan Deposition Exhibit No. 3?

A. Yes.

Q. Can you tell us what that is?

A. It is the MEAS validation study.

Q. And what does that mean?

A. It is a study they did nationally on what the basic qualifications are that you need for entry level firefighting.

Q. And what year did you give a test that was validated by this MEAS validation study?

A. I believe the first one we gave was in 1983 or '84.

Q. And then between '88 and '89 it was the '89 test that related to this study; is that correct?

[p. 14] A. We have used MEAS every year except '88.

Q. I'm going to show you now what has been marked as Callahan Deposition Exhibit No. 4, and tell us what that is.

A. This is – that is a transportability study where we talk to our own firefighters and say, when you come in what are the knowledge and skills and abilities that you need to help you pass the academy and to be a successful firefighter.

MR. WYLER: We also have not been provided with a copy of that document.

Q. And when was this transportability study prepared?

A. I believe that was in 1983, '84. I did not do this myself, this was done by another analyst in our office.

Q. So this is from '83 and '84?

A. Uh-huh.

MR. VOLLMAN: Bates stamped November 8, 1983.

MR. SCHRIDER: That is on the first long page.

MR. VOLLMAN: Right.

[p. 15] Q. So it is your contention that the transportability study done for the MEAS exam also demonstrates validity with respect to the 1988 test; is that correct?

A. Right.

Q. And what company, what national test was the 1988 test?

A. Cooperative Personnel Services.

Q. Then in order to determine the accuracy of your statement, we would have too look at the Cooperative Personnel Services validity study?

A. We will get that for you.

Q. And see if they say they are measuring the same things that you have identified to be those basic skills necessary in Cincinnati to be trained as a fire recruit; is that right?

A. Uh-huh.

Q. So we can't really get that answer today?

A. I can even get you a copy of the test, they are so similar. They are very basic tests on the reading, math and mechanical reasoning.

Q. In terms of the validity study, we will get that as soon as you get it?

A. Right.

[p. 16] Q. Where in the MEAS validity study does it show that the test may be valid for the purpose of ranking people by their written test scores?

A. I would have to go through it, I haven't looked at it in quite a while.

Q. You are not really sure it approaches it from that angle?

A. No validity study is going to say if you got number one right and I didn't, that you're smarter than me, but certainly the inference is that the more you get right the better qualified you are. And that is not when there are small differences, but certainly as we said if you are ranked No. 3 and No. 103, you did substantially better, but basically I agree with you that if you're talking 3 and 10, what we are looking for are the minimum qualifications we are not worried about rank because we had the consent decree.

Q. Well, certainly from the City's perspective, every one who scores above passing is qualified to receive training; isn't that right?

A. Yes.

MR. WYLER: Objection

Q. So the City doesn't feel that it is hiring a less qualified firefighter when it hires from [p. 17] the minority list as opposed to the majority list?

MR. WYLER: Objection

Q. Everyone is minimally qualified; right?

A. Right. This is only one small component of a very long process, the written test.

Q. Now in your response to 3-C of the interrogatories which were marked as Callahan Deposition Exhibit

No. 1 on page 6, you were asked whether the City has tested or determined the relative success black persons have achieved on said examination as compared to white persons, and reasons for any such differences. And the answer was that, "No study has been conducted. The results of the exams indicate some disparate impact on the written test"; is that correct?

MR. WYLER: Standing objection to this line of questioning.

Q. That was the answer; right?

A. Right.

Q. Now this answer, like the others, apply to both the 1988 exam; right?

A. Right.

Q. And the 1989 exam?

A. Right.

Q. Is that correct?

* * *

[p. 36] A. Correct.

Q. Now assuming that to be true, you were saying that over the spread of the lists you think that there is in fact a difference in qualification between the people near the top and maybe the people near the bottom.

Would you believe, and I notice if you look in these lists, there are a lot of people lined up with the same test score; correct?

A. Correct.

Q. Would you say people who are 20 points apart are going to have a difference in ability in firefighting? Strike that.

Twenty points is a major difference in these exams; is it not?

MR. SCHRIDER: Objection. Are you asking her to give testimony based on the results of the validity study, or just her view?

MR. WYLER: This is her view as the person who oversees the recruitment process.

A. I don't know if I could say that. The written testing is such a small part of it, just because you got 20 points lower on the written test, [p. 37] you might be the best at the physical ability or more proficient at other aspects of the job.

Q. But you stated earlier, in your earlier testimony that you thought that there would be a difference between those ranked near the top of the list and those, say, a hundred down on the list?

A. There is a difference in proficiency on the written test. If I got 95 and you got 96 that wouldn't be indicative that you were smarter than I at this part of the test.

Q. If you got 95 and I got 83?

A. I would show more proficiency on this component of the test, yes, I would say that.

Q. Is it not correct, with the exception of the City's interpretation of the consent decree, the Ohio Revised Code would still require the City to hire off a single list by relative excellence based on the written exam; is that correct?

MR. VOLLMAN: Objection. What the code requires.

A. No, it wouldn't.

Q. It wouldn't?

A. We could have an oral component to that, it would not be just a written test. Or we could choose to give points for the physical ability test or

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TILFORD YOUNGBLOOD, *et al.*, Plaintiffs, vs. JOHN DALZELL, *et al.*, Defendants.	:	Civil Action No. 8774 : Judge Rubin : DECLARATION OF CHARLES J. CRANNY

Charles J. Cranny deposes and says:

1. I am Professor of Industrial Psychology and Chair of the Psychology Department at Bowling Green State University in Bowling Green, Ohio.

2. I reside at 605 Pasteur, Bowling Green, Ohio.

3. I am an Industrial Psychologist and have a Doctorate in Psychology from Iowa State University and Psychologist License No. 950 from the State of Ohio.

4. I have written on employment issues and am familiar with and regularly use statistical methods in my teaching, research and consulting.

5. The courses I teach at Bowling Green State University include Personnel Selection; Statistics; and Statistical Analysis of EEO Issues at both the undergraduate and graduate levels.

6. I have served as a consultant and expert witness in both statistics and industrial psychology for a number of both plaintiffs and defendants in cases involving various forms of race or sex discrimination in employment.

Clients and cases are listed in my vita which is attached as Appendix 1.

7. At the request of plaintiff's counsel, I have done a review and analysis of various aspects of the hiring practices for firefighters in the City of Cincinnati. My review and analysis included both the 1988 and 1989-90 selection processes.

8. *1988 testing, selection and hiring – adverse impact analysis.* Table 3 (attached) shows that statistical test of the effects of the Background Investigation Component. As the Table shows, the proportions of white and black applicants who passed this component were .49 and .30, respectively. The Adverse Impact Ratio (A.I.R.) is the "rule of thumb" used by federal agencies as evidence of adverse impact. An A.I.R. of less than .80 is regarded as evidence of adverse impact (Section 4.D., Uniform Guidelines on Employee Selection Procedures (1978); 43 FR 38297 (August 25, 1978). The A.I.R. here if .62. In addition, a test of the statistical significance of the difference between the selection rates for the two groups indicates that the probability that the difference could be attributed to chance is less than one in one hundred.

Table 4 shows the same analysis for the results of the Written Examination. As noted on the table, "pass" refers here to those who passed the Written Examination and continued in the selection process; "fail" refers here to those who failed plus those in the Reserve category (i.e., those who did *not* continue in the process). The proportion of black applicants passing is .23. The proportion of non-black applicants passing is .66. The A.I.R. is .35, and the probability that the difference between the selection

rates could be attributed to chance is less than one in one million.

9. *1989 testing, selection and hiring – adverse impact analysis.* Table 5 (attached) shows the distributions of Written Scores for white, black, and other applicants, respectively. Figure 1 is a graphical depiction of these same data comparing white and black applicants' scores. As these data show, when the two groups of scores are compared, the scores of the black group are lower than those of the white group. In fact, only about 13% of the black scores exceed the median (50th Centile) of the white scores and fewer than 11% of the white scores fall below the median of the black scores.

Tables 6, 7, and 8 show statistical analyses of the effects of each of three different cut scores (minimum passing scores) on the Written Test. The cut scores illustrated in the three tables are 70, 80, and 90, respectively. In the tables, the column headed "S.R." shows the proportions who would pass with each of these cut scores. In each case, the A.I.R.s are well below .80. In addition, the tests of the statistical significance of the difference between the resulting selection rates for the two groups indicate that the probability that any of these differences could be attributed to chance is less than one in one million.

Taken together, Tables 5, 6, 7, and 8 are Figure 1 demonstrate that the use of any single cut score (minimum passing score) on the Written Test would have a clear adverse impact on black applicants.

10. *Validation of written test.* I have read the answers to Interrogatories No. 4, 5 and 6 of *Intervenors' Interrogatories to City Defendants.* . . .

The response to Interrogatory No. 4 indicates that the use of the test is based on content validity. Whether or not evidence exists for the content validity of the written test, such evidence does not address the question of whether higher scores on the test are associated with higher levels of performance on the job. In order to justify ranking on the basis of test scores, it would be necessary not only to demonstrate that the content of the test is closely related to the content of important aspects of job performance, but to demonstrate in addition that the test scores exhibited sufficient measurement reliability and were linearly related to job performance throughout the range of scores in which distinctions were made.

The response to Interrogatory No. 5 indicates that the personnel department has performed no study which would provide a justification of ranking applicants on the basis of test scores.

The answer to Interrogatory No 6. indicates that a study justifying ranking applicants on the basis of written test scores could not be done. The first sentence of that answer claims that since the selection process consists of several components, " . . . it would be impossible to ascertain whether the written test alone is predictive of a significant difference in the job performance of a firefighter".

This claim is false. Written test scores of all applicants are available. Some measure of job performance could be obtained for those hired. Written test scores

could then be compared with scores on the performance measure for those hired (and a validity coefficient computed). The procedure and the statistics involved are well known and widely published. It is a straightforward predictive validity problem, probably involving a correction for range restriction. Anyone qualified to evaluate the validity of a selection procedure should regard it as routine. The presence of other components is irrelevant as long as written test scores are available in a form unaffected by the other components. This last statement is true regardless of the validation approach used.

The second sentence of the response to Interrogatory No. 6 is not responsive to the question. A test based on so-called "content validity" should, indeed, predict entry-level performance. If the 13 week training program covering "all aspects of job performance" is completed before recruits perform as firefighters, the test *should* measure skills and knowledge required for performance but *not* covered by the training program. If the skills and knowledge tested for are included in the training program, the test is unnecessary and inappropriate. Alternatively, if the test is intended to select people with specific skills and knowledge, it is unnecessary to deal with such skills and knowledge in training.

If "entry level" is prior to the training program, the test should predict relevant performance at that point, and the presence of a (later) training program is irrelevant to the determination of the validity of that prediction. If "entry level" refers to a period subsequent to the training program, then there should be no overlap between the skills and knowledge "determined" by the

test and those which the training provides. It is inappropriate to reject those who lack particular knowledge when a training program will make it available when it is needed. This is particularly true when minority group members show disproportionate rates of rejection.

The form of validity evidence relied on here ("content validity") is inappropriate for any claim that might be made that the test determines skills and knowledge required for success in the training program. Such a claim would require comparison of test scores and a measure of performance in training in the manner described above.

If the skills and knowledge involved in the test are different from those involved in the training program, the presence of the training program has no effect on the ability to determine whether the test is predictive of relevant performance.

If the differences in performance related to test scores are claimed to be altered or eliminated by the results of the training program, the use of the test for selection would be inappropriate. In that case, the skills and knowledge that the test is designed to determine would have no effect on, or relationship to, relevant performance differences.

The *Standards for Educational and Psychological Testing* (APA et al., 1985), in the chapter concerned with employment testing, contain relevant material at Standard 10.4. They state that the content domain (i.e., those aspects of job performance which the test is designed to predict) " . . . should be described by characteristics that (a) can be

represented in test content, (b) will not change substantially over a specified period of time, and (c) the applicant should possess when being considered for employment".

In summary, evidence which may be sufficient to establish the content validity of a measure or selection procedure is not necessarily sufficient to establish a justification for ranking applicants on the basis of test scores. Evidence relevant to the question of whether differences in test scores are related to differences in level of firefighter performance can be gathered regardless of whether or not there are other components in the selection process. The presence of other components is irrelevant to such an investigation both for evidence gathered by a predictive validation strategy and when such evidence is obtained from an appropriate comparison of test content and job performance content. The presence of a training program whould [sic] also be irrelevant to the determination of whether the written test alone is predictive of a significant difference in the job performance of a firefighter.

I assert that the foregoing is true, under penalty of perjury.

/s/ Charles J. Cranny
Charles J. Cranny
Executed on January 30, 1991

Table 3. Test of 1988 Background Investigation Component

	Fail	Pass	Total	S.R.
White	55	52	107	.49
Black	89	39	128	.30
Total	144	91	235	

A.I.R. = .30/.49 = .62
Chi-square = 7.33
Z = 2.71 ($p < .01$)

Data Source: 1988 "disqualification letters" and telephone conversations with John Schrider, Esq., 10/24/88

Reference: Guilford, J.P. and Fruchter, B. (5th ed.) (1973) *Fundamental Statistics in Psychology and Education*. New York: McGraw-Hill.

Table 4. Test of Results of Written Examination 1988

	Fail*	Pass*	Total	S.R.
Black	761	230	991	.23
Other	432	856	1288	.66
Total	1193	1086	2279	

A.I.R. = .23/.66 = .35
Chi-square = 418.27
Z = 20.45 ($p < .000001$)

Data Source: Computer Printout of 1988 Written Test results.

Reference: Guilford, J.P. and Fruchter, B. (5th ed.) (1973) *Fundamental Statistics in Psychology and Education.* New York: McGraw-Hill.

*Pass = Passed and continued in process.

Fail = Failed and Reserve.

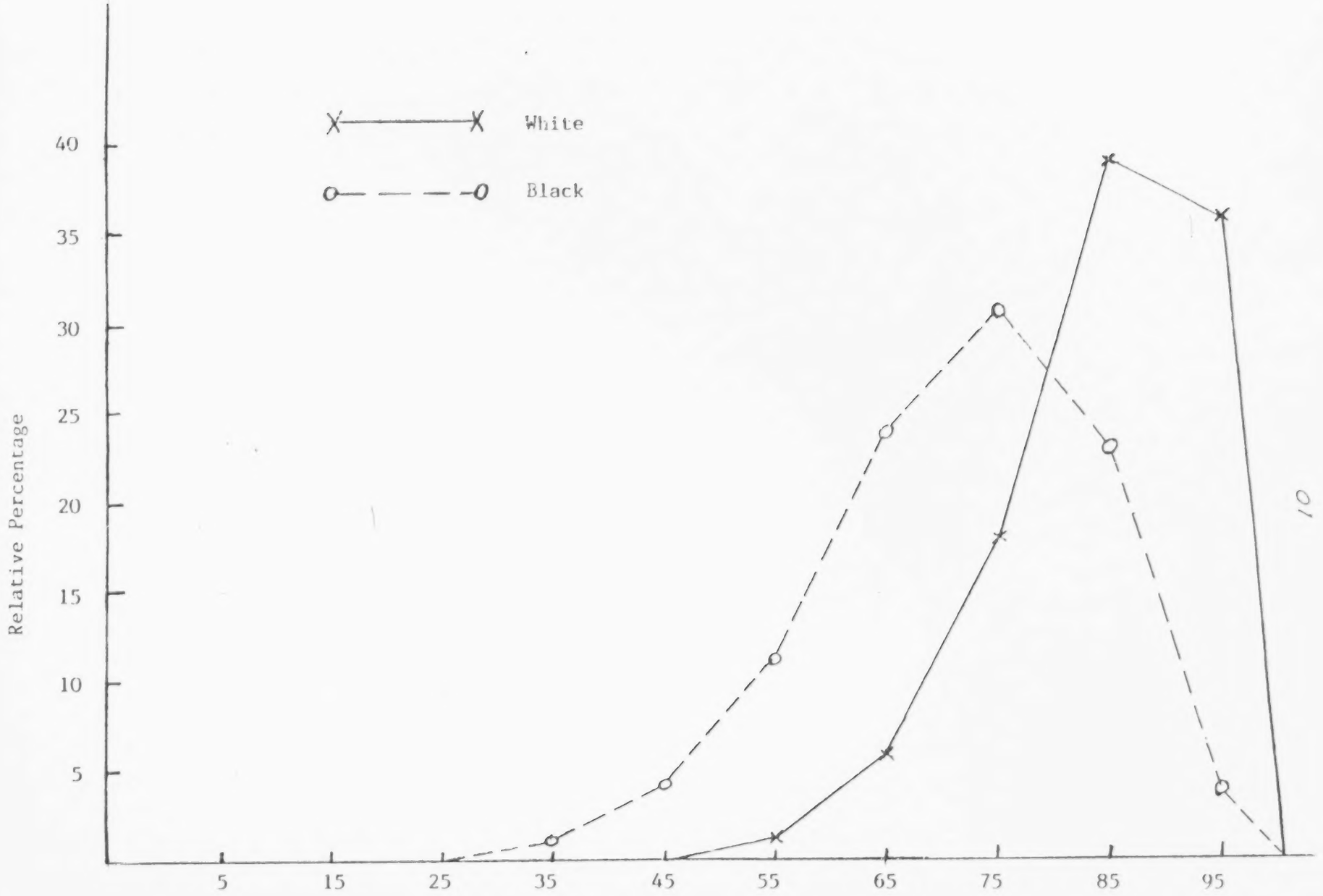

Figure 1. Written Score Distributions by roll.
(Score range midpoints)

Table 5. Test Scores (% Correct) by Race

Score	WHITE N	WHITE Rel. %	WHITE Cum. N	WHITE Cum. %	BLACK N	BLACK Rel. %	BLACK Cum. N	BLACK Cum. %	OTHER N
90-100	399	36	1095	100	30	4	683	100	2
80-89	426	39	696	64	154	23	653	95	3
70-79	192	18	270	25	214	31	499	72	5
60-69	61	6	78	7	166	24	285	41	4
50-59	14	1	17	1	82	12	119	17	1
40-49	1	-	3	-	29	4	37	5	0
30-39	1	-	2	-	8	1	8	1	0
20-29	0	-	1	-	0	-	0	-	0
10-19	0	-	1	-	0	-	0	-	0
0-9	1	-	1	-	0	-	0	-	0
N	1095				683				15
est.Mdn.	86.0				72.1				77.0

Notes:

n	=	number of scores in that score range
rel. %	=	percentage of scores for that racial group which fall in that score range
cum. n	=	number of scores below upper limit of that score range
cum. %	=	percentage of scores below upper limit of that score range
est.Mdn.	=	Median (50th Centile) estimated from these data

Source:

Computer printout of I.D. numbers and scores titled "Listing in Ascending Order of ID's, Fire Recruit" and untitled printout of ID's and scores with racial group identification.

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Table 6. Statistical Test of Written Scores with Cut Score = 70

	Fail	Pass	Total	S.R.
White	78	1017	1095	.929
Black	285	398	683	.583
TOTAL	363	1415	1778	

A.I.R. = .583/.929 = .63
Chi-square = 307.88
Z = 17.55 (P < .000001)

Reference: Guilford, J.P. and Fruchter, B. (5th ed.) (1973) *Fundamental Statistics in Psychology and Education*. New York: McGraw-Hill.

Table 7. Statistical Test of Written Scores with Cut Score = 80

	Fail	Pass	Total	S.R.
White	270	825	1095	.753
Black	499	184	683	.269
TOTAL	769	1009	1778	

A.I.R. = .269/.753 = .36
Chi-square = 399.53
Z = 19.99 (P < .000001)

Reference: Guilford, J.P. and Fruchter, B. (5th ed.) (1973) *Fundamental Statistics in Psychology and Education*. New York: McGraw-Hill.

Table 8. Statistical Test of Written Scores with Cut Score = 90

	Fail	Pass	Total	S.R.
White	696	399	1095	.364
Black	653	30	683	.044
TOTAL	1349	429	1778	

A.I.R. = .044/.364 = .12
Chi-square = 234.22
Z = 15.30 (P < .000001)

Reference: Guilford, J.P. and Fruchter, B. (5th ed.) (1973) *Fundamental Statistics in Psychology and Education*. New York: McGraw-Hill.